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FEDERAL FACILITY COMPLIANCE ACT OF 1989

HEARING

BEFORE THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 1140

A BILL TO PROVIDE THAT FEDERAL FACILITIES MEET FEDERAL AND STATE ENVIRONMENTAL LAWS AND REQUIREMENTS AND TO CLARIFY THAT SUCH FACILITIES MUST COMPLY WITH SUCH ENVIRONMENTAL LAWS AND REQUIREMENTS

MAY 2, 1990

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FEDERAL FACILITY COMPLIANCE ACT OF 1989

WEDNESDAY, MAY 2, 1990

U.S. Senate,
Committee on Environment and Public Works,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 406, Dirksen Senate Office Building, Hon. Quentin N. Burdick (chairman of the committee) presiding.

Present: Senators Burdick, Mitchell, Baucus, Lautenberg, Lieberman, Symms, Durenberger, Warner, and Jeffords.

OPENING STATEMENT OF HON. QUENTIN N. BURDICK, U.S. SENATOR FROM THE STATE OF NORTH DAKOTA

Senator **Burdick**. Good morning.

The Committee on Environment and Public Works is meeting today to consider legislation concerning Federal facility sovereign immunity and compliance with Federal, State, and local environmental laws. S. 1140, as introduced by the majority leader, would clarify that the waiver of sovereign immunity that is now in the Resource Conservation and Recovery Act also applies to the imposition of civil penalties against the Federal Government. It would also enable the Environmental Protection Agency to issue administrative orders against other Federal agencies.

Both of these enforcement tools are designed to improve Federal agency compliance with environmental laws.

It is well established that Federal facilities must comply with the environmental laws to the same extent as facilities operated by the private sector. There is only one standard of compliance for everyone, public or private. The Federal Government must set a good example for the rest of the community if we want the law obeyed and the environment preserved.

There can be no double standards. We have had problems in the past with Federal facility compliance. The Department of Energy now figures that it will cost over $100 billion to clean up contamination at DOE sites. The Department of Defense expects that it would cost $10 billion to $15 billion to clean up Defense sites.

Many Federal agencies have recently taken positive steps to achieve compliance with the law and to clean up past mistakes. This is a good sign. However, there is still a long way to go, and it will cost a lot of money. We must make the commitment to continue the positive steps that have been taken, and we must be ready to spend the money to do the job.

Senator Mitchell's bill is designed to help make sure that our Federal agencies comply with the law. It is also designed to help make sure that our Federal facilities are cleaned up. These are two goals that must be achieved. I commend the majority leader for his leadership in this area of environmental compliance. I know of no stronger champion of a clean air environment and no stronger advocate of full compliance with the environmental laws.

I look forward to hearing from our distinguished witnesses on this bill.

Our first witness this morning will be the Honorable Senator from the State of California, Senator Wilson.

STATEMENT OF HON. PETE WILSON, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Good morning, Mr. Chairman. Thank you very much for the opportunity to appear before you, and thank you for convening this hearing on a subject of enormous importance.

Last summer, during the debate on the defense authorization bill, I was very pleased that Senators Chafee, Baucus, and Lautenberg assured me that the committee would convene hearings to address the very troubling problem of Federal facility cleanup issues. I am very pleased the committee has now assembled the Federal facility experts to address this very important matter.

It is serious for obvious reasons. There are a number of U.S. military installations around the world which have a long history of rather careless maintenance practices. In short, it has resulted in problems, especially problems of serious ground water contamination.

At the same time, many of the Department of Energy facilities have also experienced severe problems in the storage and treatment of hazardous wastes.

The projected costs of remedying these problems are staggering. One study by GAO suggested that the cost of cleaning up the Energy Department sites could reach $120 billion for its part. The Department of Defense has estimated that the cost of cleaning up contaminated military installations will reach at least $15 billion.

Mr. Chairman, while the cost is high, to delay increases the costs and endangers the health of our citizens. That is why I support S. 1140 and urge the committee to go further and consider additional measures to accelerate the pace of the cleanup.

S. 1140 makes clear that Federal facilities cannot cloak themselves under claims of sovereign immunity to defeat the imposition of State or local fines for violations of hazardous and solid waste laws. As you have pointed out very clearly in your opening statement, Mr. Chairman, there really cannot be a double standard. Once S. 1140 is enacted into law, States, localities, and even citizens will be able to obtain penalties from the Federal facilities that persist in violating their obligations to remedy their environmental contamination problems.

So the importance of S. 1140 to the cleanup effort really cannot be overemphasized. It provides to the States and to localities and to individual citizens an additional weapon in their effort to speed the cleanup at Federal facilities. Under current law, the Federal Government has been successful in California and in a number of other States in contesting the imposition of fines for violations of

RCRA by invoking sovereign immunity as a defense. As a result, the Federal facilities under S. 1140 will clearly be more willing to negotiate reasonable cleanup schedules, and those that allow the hope of a much accelerated pace.

Mr. Chairman, I understand that the Administration has not agreed to every aspect of this bill, but I am confident that common ground can be reached on the essential need to require Federal facilities to move more quickly with cleanup and compliance, because the sad fact is that our Federal facilities have a very spotty history with respect to environmental contamination. In my own State of California there are at least 20 military installations that have been placed on the National Priority List for cleanup under Superfund. This list constitutes the catalog of the most contaminated sites in the country. This list does not begin to cover those military bases that might be deemed in violation of the cleanup requirements imposed by RCRA.

Mr. Chairman, it is clear that we must act aggressively to require these facilities to move quickly to address their contamination problems. There has been strong frustration on the part of communities whose drinking water supplies have been adversely affected by ground water contamination and who have been fighting, sometimes for years, to force the military to clean up their problem. Likewise, there is a growing sense of frustration at the State level at the delays that attend their efforts to force compliance with hazardous waste laws.

Mr. Chairman, the pollution at these sites often contaminates underground aquifers via abandoned or poorly-constructed wells. The cleanup of these sites cannot wait until tomorrow. The longer these contaminated sites go unmitigated, the greater the likelihood will be that they will spoil limited fresh water sources. As California enters its fourth straight year of drought conditions, water resources become even more precious. The State of California cannot have its fresh water aquifers imperiled by contaminated sites.

Therefore I commend the efforts of the committee to enact legislation that would invigorate the cleanup effort at these facilities. But, Mr. Chairman, we must address this problem on a number of fronts. S. 1140 is a very good initiative under the Resource Conservation and Recovery Act, but it addresses only part of the problem.

I invite the committee to consider the proposal I put forward last August on the Senate floor requiring Federal agencies to enter into cleanup agreements under the Superfund statute once their facilities have been proposed to be listed on the National Priority List. As I emphasized during the debate last August, it is just unacceptable for the Department of Defense to be delaying these interagency agreements for four or five years after their installations are placed on the National Priority List for cleanup.

Several examples of the problem exist in my State. Norton Air Force Base was proposed for listing on the National Priority List in October, 1984, but the interagency agreement under Superfund was not concluded until June, 1989, five years later. Mather Air Force Base also was proposed for inclusion on the NPL in October, 1984. The base did not conclude its interagency agreement until July, 1989. The Naval Air Station at Moffet Field was proposed for inclusion in April, 1985, yet that facility had not concluded any sort of interagency agreement as of last summer, and I am advised that none has been concluded to date.

Similarly unacceptable delays can be found at other bases around the country. In fact, as I am sure the members of this committee know well, military bases have been placed on the Superfund NPL in Florida, Idaho, Maine, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, and Wyoming.

I strongly urge increased funding for the Defense Environmental Restoration account from its current level of $500 million to a level of $1 billion. I am hopeful that my friends on the Armed Services Committee will agree that such funding is important if we are realistically to hope to speed up the process by which contamination problems are resolved.

I am also strongly in favor of an increase in funding for EPA positions which are needed to design and implement interagency agreements. It does little good to have the military base proposed for listing on the NPL, only to have the actual listing delayed for a year or more due to lack of adequate staffing.

So, Mr. Chairman, I urge the committee to include as part of S. 1140 language that I offered last summer as an amendment to the Defense authorization bill. This language would amend section 120 of the Superfund statute to require that military installations enter into interagency agreements with States and localities to initiate cleanup of sites proposed for listing on the NPL within one year of being proposed for that listing. This would be a significant improvement on current timetables.

Mr. Chairman, thank you for the opportunity to appear today. Again, I commend you for assembling the key representatives of our Federal facility cleanup effort for this hearing. The time has come for appropriate Executive agencies and the Congress to pursue a coherent and timely strategy for expeditious cleanup of U.S. Government facilities.

Thank you, sir.

Senator BURDICK. Thank you.

Senator Lautenberg.

Senator LAUTENBERG. Mr. Chairman, I will wait until our colleague completes his testimony before I make my opening statement. I would like to reserve the time to do that after he leaves.

But I do have a question for Senator Wilson, because he focuses on something that I think is very important, and that is the abuse of our environment as a result of DOD facilities not adhering to the rules as we would like to see them done.

I have this concern, Senator. First let me say that though this hearing is essentially RCRA-oriented, whatever deals with the environment in terms of cleanup is fair game, as we say. But it's not primarily a Superfund review.

As an author of a major part of the Superfund renewal in 1986, one of the things we tried to get was some kind of a priority established so that all facilities are handled fairly. Certainly, DOD or DOE facilities ought not to be exempt, but if we accelerate the cleanup of DOD facilities, what effect might we have on other non-DOD facilities that are just as requiring, just as damaging, and just as much in need of financing as the cleanup of a DOD facility?

Senator WILSON. Well, I think the answer, Senator Lautenberg, is not to do so at the expense of others, but what we're talking about in my testimony this morning has been those DOD facilities that are proposed for the NPL. What I am saying is that we have seen delay of five years in coming to an interagency agreement necessary to move on contamination on a military site that is on the National Priority List.

I would say the answer to your question—really, to turn the question around—we shouldn't give preference to non-NPL military sites, but neither should we treat the military sites on the NPL differently from others on the NPL. And they are being treated differently, precisely because there is sovereign immunity, and that fact has resulted in their being able to greatly attenuate the process of coming to agreement with State and local agencies.

This bill, S. 1140, I think would aid considerably in that, but what I am proposing is that part of S. 1140 contain that provision that requires that within a year of proposal for listing, there be an agreement.

Senator LAUTENBERG. Over the years since Superfund was created in 1980, we have been impatiently waiting for action to take place on the cleanup of these sites. I couldn't agree with you more. We ought to get on with it and we ought to get on with it promptly. We've had a problem with funding levels, as the Senator very well knows. We've had a problem, once having established an authorized level, getting the appropriated funds approved so that we could move on with these things.

The only point that I make—again, not to disagree with your concern or with the action program that you advocate—is to say that whatever we do with DOD sites ought, in fact, to be done with all other sites as well. If there is a peril to the community, if there is potential damage to the water supply—and you mentioned New Jersey in your comments; more of our water supply is gained from ground water sources than reservoirs, by a significant measure, and those water supplies are terribly endangered when there is any kind of leaching or pollution problem nearby.

Again, I agree with you. We ought to get on with it. Federal sites ought not to be exempt. I just would not be encouraged by the introduction of a measure that says that DOD sites get a priority. I think we are probably in agreement on this, but they ought not to be left out.

Senator WILSON. I think that actually just the reverse has been occurring. Even those on the NPL have been able to drag their feet because there has been this lack of clarity, because of the defense of some sovereign immunity—although in more instances, I must tell you candidly, there hasn't been that claim raised, but instead there has been foot-dragging. It has had more to do with the inability of even cooperative base commanders to get much response up through the chain of command and back. But in any case, it has taken five years. Several of the bases are on the National Priority List in my State. What we are saying is that in order to speed up that process, as you and I agree is required, on those National Priority List sites, what we should do is at the very least have a requirement that once they are proposed for listing, there be an interagency agreement as the beginning of cleanup within a year of that proposal for listing. When it takes five years just to get the interagency agreement, what you clearly have is foot-dragging.

Senator **Lautenberg**. I thank the Senator.

Thank you, Mr. Chairman.

Senator **Burdick**. Senator Durenberger.

Senator **Durenberger**. Mr. Chairman, I have a statement that I will give after Senator Wilson is through. I don't have any questions.

Senator **Burdick**. Senator Baucus.

Senator **Baucus**. Mr. Chairman, I do have a statement, but in deference to the Senator from California I will wait.

Senator **Burdick**. Senator Warner.

Senator **Warner**. Mr. Chairman, at such time as is convenient for witnesses and the committee, I would like to make a brief opening statement, but will defer it until our colleague has had the opportunity.

Senator **Burdick**. Very well.

Thank you, Senator.

Senator **Wilson**. Thank you very much, Mr. Chairman.

Senator **Burdick**. Senator Lautenberg.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator **Lautenberg**. Thank you, Mr. Chairman.

It is a very important hearing that you are holding. I commend you for doing it. We're talking about the Federal Facilities Compliance Act, S. 1140.

I would also like to commend the majority leader, Senator Mitchell, for introducing this legislation, which I was pleased to cosponsor.

Today we are going to be addressing some of the complex issues that face us, but we shouldn't lose sight of some of the simple questions as well.

Does a town with a contaminated water supply care whether the polluter was a private corporation or a Federal installation? Does that community really care about getting that water cleaned up? The answer to the second one, obviously, is yes. The answer to the first one is no. People expect our environmental laws to guarantee protection and cleanup regardless of who the polluter is, and that's what the Congress intended back in 1976 when we passed RCRA, the Resource Conservation and Recovery Act. We intended that States could use the same enforcement tools against Federal facilities as they use against private parties. Federal courts in Ohio and Maine have properly interpreted the law's intent.

So why are we here today? Because some misguided courts and the Administration have concluded that the law creates a double standard. They have suggested that States can obtain fines and penalties against private parties that violate RCRA, but not against Federal agencies.

I think the law is clear on this point, but to assure that the courts universally follow the Ohio and Maine precedents, S. 1140 clarifies the principle. The key is for States to have all the enforcement tools in their arsenals that they need.

The need is obvious. DOD and DOE together annually generate about 20 million tons of hazardous or mixed hazardous/radioactive wastes. EPA currently classifies 52 Federal installations as being in significant noncompliance with RCRA. Double standards for enforcement may be contributing to double standards for compliance.

In fiscal year 1989, 63 percent of inspected Federal facilities had RCRA violations. That compares to 38 percent for the private sector.

Mr. Chairman, we may hear some arguments against clarifying State enforcement powers. Some may argue that States will abuse fines and penalties when they see a soft target. Some may argue that the States will interfere with cleanup priorities. It is ironic, though, that the same Administrations that are constantly seeking to shift Federal environmental obligations to the States argue that the States can't be trusted with enforcement powers.

President Bush, our would-be environmental President, apparently thinks States are getting too much assistance in dealing with sewage treatment. Despite then-candidate Bush's professed concerns with Boston Harbor, when it comes to clean water President Bush wants the States to do more and the Federal Government, less. But without any evidence that the States will abuse enforcement powers, some suggest that we have to be careful when it comes to Federal facilities. This line of reasoning insults our States. It turns the issue on its head. It's like saying, "We'd better not give David too many stones for his slingshot. If we're not careful, he's liable to scare Goliath."

The American people won't buy this argument. The public doesn't want to protect Federal polluters from environmental laws. They want environmental laws to protect them from Federal polluters. I'm not worried about State environmental enforcers harming the Pentagon. I'm worried about the Pentagon exposing citizens to health risks from contaminated ground water.

Our mission must be to assure compliance with our laws by everyone, whether it's the Defense Department or XYZ Company. Mr. Chairman, that's what this bill is about. That's why I'm committed to working with you to see it enacted. I appreciate the fact that you have called this hearing.

Senator BURDICK. Senator Durenberger.

OPENING STATEMENT OF HON. DAVE DURENBERGER, U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator DURENBERGER. Mr. Chairman, I thank you, too, for calling this hearing.

I'm going to begin by just briefly describing the size of the problem we're dealing with. Federal agencies operate 339 facilities that treat, store, and dispose of hazardous wastes. There are thousands of hazardous waste disposal units at these facilities, hundreds of which we now know will require corrective action to protect human health and the environment.

It will cost us billions of dollars to bring the ongoing operations of these facilities into compliance with Federal environmental laws. It will cost us tens of billions and take many years to correct the past abuses.

There are sites in every single State, so every Senator has experienced the frustration that is the essence of the cleanup problem. In Minnesota, the land of 15,000 lakes and several large aquifers, the principal Federal facility is the Twin Cities Army Ammunition Plant, called TCAAP, located in New Brighton. The industrial solvent is TCE, a waste from the manufacturing process, which was disposed of in a lagoon at TCAAP for several years in the 1950s and 1960s. The plume from the lagoon eventually contaminated 25 square miles of the principal aquifer supplying drinking water to 2 million people in the Twin Cities.

The problem was discovered in the late 1970s. Eight families living near the plant lost their wells. The city of New Brighton lost its municipal well field. The problem had just been discovered in 1978 when I was elected to the Senate. It took 10 years for the U.S. Army to admit its responsibility and to sign an agreement to clean it up.

Superfund was enacted after the site was discovered. It was reauthorized before we could get an admission of responsibility from the Army, and that's just the agreement to take action. Complete cleanup of the site will take more time.

There is no hope of restoring the aquifer to its former purity. The city of New Brighton has been compensated, but the litigation with the eight families goes on. The Army has yet to offer a settlement in that case, and apparently these families will have to take on the United States Army and their Justice Department in a trial to recover the loss which they've suffered.

Now, that is the reality of Federal facilities problems for just one of one hundred Senators.

When the issue before us today is looked at from that perspective, my instinct is to give EPA and the States every tool available to force action at these sites. A big fine laid on the Army in 1980 or 1981 might have saved years of frustration for the people of Minnesota and this Senator in the TCAAP case.

The argument on the other side is the argument for national priorities, and it is called the "worst first" argument. And as a principle in this period of time, it has some appeal. Since we can't do everything immediately, let's do what's most important first. But as a practical matter, we ought to be skeptical about that kind of approach. I don't think it's possible to set up some national ranking system of sites and then make appropriations to carry out that priority system. We know the names of the worst sites. They are called Rocky Mountain Arsenal, Fernald, Hanford, the Idaho National Lab. They will be talked about all morning. Those sites alone will cost billions of dollars or more each, and they will take years and years to clean up.

Is it suggested that all of the rest of the sites stand in line while those sites are resolved? On behalf of about 92 Senators whose sites I haven't named, I hope not.

I do agree that there is an immediate threat to health, and where there is, we should take removal action. That's how Superfund is organized at private sites. Many of those measures have been implemented and the immediate removals that are necessary are not a billion-dollar issue. Beyond a few emergency responses, I don't see how we could get consensus on some rank ordering applied to a National Priority List. It is possible to draw up a list of the worst, but who goes first in this body is not capable of rational determination. Rather, we must muddle through as best we can.

I do believe—and I think the States would agree—that it is far better to proceed with a cleanup on the basis of an agreement between the Federal facility and the State than on the basis of unilateral order or injunction. We ought to do what we can in this process to encourage comprehensive corrective action agreements between the Federal facility and the State for each site.

I also see evidence that the attitude of the Department of Defense is changing. DOD is now looking to make rapid progress in resolving these problems. That attitude ought to be encouraged by keeping the negotiations out of the courts

I continue to have my doubts about the attitude of the Department of Energy. DOE started its comprehensive effort to identify the "worst first" list in 1985, and according to a GAO report issued in March of this year, DOE has yet to resolve even one of the more than 600 environmental problems it identified at its sites. No progress in five years is not a record to be rewarded.

I think one final point, Mr. Chairman, to me it is clear that Congress intended in RCRA that Federal facilities be treated in all respects just the same way as private parties. Nothing in the legislative history of section 6001 suggests that any distinction with respect to fines and penalties was made. The language is not crystal clear as it is in the Clean Air and Safe Drinking Water Acts, but there is no suggestion in any part of the history of those statutes that the intention was any different. S. 1140 simply clarifies that intent.

We may at some point decide to modify the policy, perhaps grant a relief or a brief moratorium on fines and penalties for corrective action, just to encourage agreements. But that would be a suspension of current policy which does provide for fines and penalties imposed by the State.

I do hope we can reach a resolution of this issue at an early date, Mr. Chairman. The issue itself is important, but it has also been tied to the question of cabinet status for EPA. I really hope that we can free that bill for action as quickly as possible.

Thank you.

Senator BURDICK. Senator Baucus.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you very much, Mr. Chairman. I appreciate your holding this hearing.

I also want to thank the witnesses who are here today. I look forward to their testimony.

Mr. Chairman, boiled down to its basic elements, the issue of Federal facilities compliance before us today is really quite simple. Should the Department of Defense, the Department of Energy, and other Federal agencies be allowed to continue to pollute our ground water, surface water, and soil? Or should they have to meet the same environmental standards as everyone else?

This issue is not new to this committee. We first struggled with it in 1976 when we enacted the Resource Conservation and Recovery Act. In that statute the Congress was careful to enact section 6001. That section mandates Federal facility compliance with Federal, State, and local requirements.

Let me read a section from the law:

> Each department, agency, and instrumentality of the Executive, Legislative, and Judicial Branches of the Federal Government shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural, in the same manner and to the same extent as any person is subject to such requirements.

Clearly, congressional intent in 1976 was, and still is, to assure that the Federal Government complies with all statutory requirements. In 1976 Congress placed Federal facilities on an equal basis with private firms, municipalities, States, and individuals who violated the Resource Conservation and Recovery Act—at least we thought so. But several courts have read congressional intent differently. In the States of Maine and Ohio, Federal courts have found that the Resource Conservation and Recovery Act clearly permits the States to recover civil penalties from the Federal Government. In fact, in the Maine decision the Court concluded, "An intelligent person reading the statute would think the message plain. Federal facilities will be treated the same as private institutions so far as enforcement of the solid waste and hazardous waste laws are concerned."

However, courts in California, Washington, and North Carolina saw it differently. They ruled against the States. In these cases, the United States Department of Justice successfully opposed States that were seeking civil penalties from Federal facilities that were violating the Resource Conservation and Recovery Act.

The Department of Justice argued that RCRA has not clearly and unambiguously waived sovereign immunity with respect to civil penalties. Let me point out that it is the same Department of Justice that argues for civil penalties against private companies, municipalities, and States. Apparently, the Federal Government wants to live by two standards, one for themselves and one for everyone else.

Nonetheless, one thing is clear: we need to clarify the law. We need to make sure that the Resource Conservation and Recovery Act clearly and unambiguously waives sovereign immunity with respect to civil penalties. That is the purpose of S. 1140. Senator Mitchell, who has been fighting for this legislation, is to be commended for pursuing it.

I am convinced that without this legislation, recalcitrant Federal facilities will continue to violate the law and the States will not be able to do a blessed thing about it. S. 1140 gives States what the Federal Government has, the ability to enforce against violations of the law.

For years, many have viewed the Federal arsenal of enforcement weapons as a threat, a deterrent, a gorilla in the closet, if you will, to force compliance. We need to extend this same enforcement arsenal to States to force the Federal Government to comply with the law.

Now, some have argued that they can support part of S. 1140, but not all of it. They support a limited waiver of sovereign immunity, one that waives sovereign immunity for compliance violations but not for corrective action violations. This makes absolutely no sense. If I understand what they're saying, they believe it's okay to penalize the Federal Government if it violates some of the laws, but not all of the laws. If a Federal facility doesn't have their proper Resource Conservation and Recovery Act training program, or a facility doesn't have hazardous waste warning signs posted, then it is okay for the State to collect fines and penalties, but if the site is leaking hazardous contaminants into the soil, ground water, and surface water, creating a real mess and a real hazard, it is not okay for the State to collect fines and penalties.

Why not? Why should the Federal Government be above the law? Why should private firms be subject to penalties, but the Department of Defense and Department of Energy and other Federal agencies be exempt?

As Mark Raciot, the Attorney General from my home State of Montana, said:

> Penalties and cleanup costs are separate issues, with the first designed to have a deterrent effect, and the second designed to remedy the immediate hazardous waste problem. The elimination of fines against Federal facilities would only seem to perpetuate the double standard now existing between Federal RCRA violators and other non-Federal violators.

Let me conclude by again stating that this legislation is needed. It is needed to treat Federal facilities the same as everyone else. Federal facilities, like everyone else, must be held fully accountable for their actions. The Department of Defense and the Department of Energy are some of the worst offenders of the law. In fact, in May, 1988, then-Vice President Bush said:

> As President, I will insist that in the future Federal agencies meet or exceed environmental standards. The Government should live within the laws it imposed on others.

S. 1140 will take a giant step toward that end.

I thank our witnesses for coming this morning, and I look forward to their testimony.

OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S. SENATOR FROM THE STATE OF MAINE

Senator **Burdick**. Thank you.

Senator Mitchell.

Senator **Mitchell**. Thank you, Mr. Chairman.

First, I would like to ask that my full statement be placed in the record, and that letters of support from 21 State Attorneys General also be placed in the record. (See p. 14.)

Senator **Burdick**. Without objection, so ordered.

Senator **Mitchell**. Mr. Chairman, I appreciate your holding this hearing on S. 1140, legislation I introduced last year to clarify that States have authority to assess fines and penalties against Federal facilities which violate hazardous waste laws. Unfortunately, not all Federal courts have agreed with this interpretation. This legislation, therefore, clarifies that section 6001 of the Resource Conservation and Recovery Act adequately waives sovereign immunity.

This is a fundamental question of public health protection and equity. The problem is that Federal facilities are among our worst polluters. This was recognized by President Bush in May of 1988 in Seattle when, as Senator Baucus has just quoted the then-Vice President and now President, he said:

> Unfortunately, some of the worst offenders are our own Federal facilities. As President, I will insist that in the future Federal agencies meet or exceed environmental standards. The Government should live within the laws it imposes on others.

What is unfortunate is that the Administration's current position on this bill is inconsistent with the President's words of 1988. But what this bill proposes is the result that Congress plainly intended in 1976 when it enacted the Resource Conservation and Recovery Act. Any other policy sends a clear signal that the Federal Government will comply only with those environmental requirements that are convenient and inexpensive to comply with.

The Clean Air Act, the Clean Water Act, the Safe Drinking Water Act all waive sovereign immunity. What differentiates RCRA from these laws is one simple but difficult fact: it will cost the Federal agencies more money to clean up their own contamination under RCRA than it does under the other statutes.

There is an implicit assumption that if the Federal Government avoids spending the many billions of dollars it now estimates that this cleanup will cost, that those costs are not incurred. But local residents pay the price every day. Each child that is harmed from drinking contaminated water pays a price. Families with increased medical bills are paying a price. They are all paying, instead of the Federal agencies that caused the problem in the first place. Often the agencies knew what they were doing and ignored the law because there was no one to hold them accountable.

Other approaches send a signal to the public that no one—no Federal agency, no State official—will be able to use the best enforcement tool that exists against the Federal Government under some circumstances. A nonenforceable law is worse than no law at all. It creates a facade, an illusion of public health protection where there is none. It is a de facto repeal of environmental requirements for Federal agencies. It is a concept I reject.

Our environmental requirements are meaningless without a mechanism for enforcing them through fines and penalties. This committee has repeatedly acknowledged the need by requiring the States to have adequate civil and criminal penalty authority before they can obtain Federal approval of their programs. How now can the Administration contend that we ought not to have such authority for enforcement against the Federal Government?

Similarly, we authorized the Federal Government to penalize State and municipal governments for failure to comply with hazardous waste laws. These governments also have limited budgets. They have serious fiscal constraints. In some cases they have to divert cleanup costs from fire and police funds, but they have to pay.

There is no question that cleanup will be expensive, but removing or reducing the best enforcement tool does not address the cost of cleanup. It merely creates doubt on whether or not there will be cleanup.

Officials from many States around the country have repeatedly testified that the Federal Government is the worst violator of pollution control laws in their States. If Earth Day had a true impact on these agencies, they would not be asking to be exempt from enforcement. They would be up here asking us for money and authority to clean up the mess that they have created.

It is ironic that it is only the Federal Government that complains it cannot afford to remedy its own environmental problems. Imagine the reaction, Mr. Chairman, if private industry came before this committee and asked to be exempt from enforcement of the environmental because it would cost them too much to clean up their contamination. What would be the reaction of members of this committee and of the Congress? I think we can all safely predict what it would be.

The Federal Government will have to spend a lot of money to clean up its hazardous waste sites. These were preventable costs, but a false sense of economy prevailed. Now the public is asked to wait and bear the additional risk to the public health.

S 1140 does not ask us to change the law. It asks only for clarification of what I believe is already clearly stated in the law. United States District Judge Jean Carter, in the case of the State of Maine versus the Department of the Navy, wholeheartedly concurred with a magistrate's statement on the issue that "an intelligent person reading the statute would think the message plain. Federal facilities will be treated the same as private institutions so far as enforcement of the solid waste and hazardous waste laws are concerned. It is hard to imagine clearer language, short of listing every possible variation of such requirements."

Well, Mr. Chairman, we now have to come up with clearer language, and that's what this bill does.

The logic of the bill is compelling. It merely removes any question whatsoever about Congress 'original intent. This is the policy embodied in our other environmental laws. It is appropriately the policy in our hazardous waste laws.

Issues raised by the Administration are more properly focused on the cost of paying to clean up the contamination created by the Federal Government. This is an appropriate and an important issues, but it is,. of course, separate and distinct from the primary issue of coverage of the law and enforcement of the law.

Mr. Chairman, S. 1140 addresses only a small part of the problem under RCRA. In the next Congress we will reauthorize RCRA. Let us use the time between enactment of S. 1140 and RCRA reauthorization to explore those other issues further and in more detail. In the meantime, we should clarify that the Federal Government is not above the law, that citizens will be as protected from environmental contamination by the Federal Government as they are protected from private industries.

Mr. Chairman, I want to apologize to the witnesses. I have to leave to go over to the floor now, and I wonder if I might have just a moment to introduce one of our witnesses, who is the Attorney General of our State of Maine?

One of the witnesses this morning will be the Attorney General of Maine, Jim Tierney. Jim Tierney has been Attorney General for a decade, has a well-established reputation as environmentally conscious and very active and aggressive in pursuing violations of the law with respect to the environment. He has been involved in this issue for some time. He brought the case which led to the decision to which I referred in my statement. I believe he is one of our Nation's experts on the interaction of Federal and State law as it involves environmental protection.

He also happens to be a good personal friend, and I am very pleased that he has been able to come down and share his experience and his insights with us. I would like to welcome him and the other witnesses today.

Mr. Chairman, I thank you and the members very much for your courtesy.

[Senator Mitchell's statement and the letters from the Attorneys General follow:]

STATEMENT OF HON. GEORGE J. MITCHELL, U.S. SENATOR FROM THE STATE OF MAINE

Mr. Chairman, thank you for scheduling this hearing on S. 1140, legislation I introduced last year to clarify that States have authority to assess fines and penalties against Federal facilities that violate our hazardous waste laws. Unfortunately, not all Federal courts have agreed with this interpretation. This legislation clarifies that current section 6001 of the Resource Conservation and Recovery Act (RCRA) adequately waives sovereign immunity.

This is a fundamental question of public health protection and equity. The problem is that Federal facilities are among our worst polluters. This was recognized by President Bush in a May 16, 1988, speech in Seattle, Washington when he stated:

"Unfortunately, some of the worst offenders are our own Federal facilities. As President, I will insist that in the future Federal agencies meet or exceed environmental standards: The government should live within the laws it imposes on others."

Unfortunately, the Administration's current position on this bill is inconsistent with the President's rhetoric of 1988.

But what this bill proposes is the result Congress intended in 1976 when it enacted the Resource Conservation and Recovery Act. Any other policy sends a signal that the Federal government will comply only with those environmental requirements that are convenient and inexpensive.

The Clean Air Act, the Clean Water Act, the Safe Drinking Water Act all waive sovereign immunity.

What differentiates RCRA from these laws is the simple fact that it will cost the Federal agencies more money to clean up their own contamination under RCRA than it does under these other statutes. There is an implicit assumption that if the Federal government avoids spending the over $100 billion it now estimates cleanup will cost, these costs are not incurred.

But local residents pay the price every day. Each child that is harmed from drinking contaminated water pays a price. Families with increased medical bills are paying instead of the Federal agencies that caused the problem in the first place.

And often the agencies knew what they were doing and ignored the law because there was no one to hold them accountable. Other approaches send a signal to the public that no one—no Federal agency and no State official—will be able to use the best enforcement tool we have against the Federal government under some circumstances.

A non-enforceable law is worse than useless. It creates a facade of public health protection where there is none. It is a de facto repeal of environmental requirements for Federal agencies. It is a concept I reject.

Our environmental requirements are meaningless without a mechanism for enforcing them, through fines and penalties. This Committee has repeatedly acknowledged this need by requiring States to have adequate civil and criminal penalty authority before they can obtain Federal approval of their programs.

Similarly, we authorize the Federal government to penalize State and municipal governments for failure to comply with our hazardous waste laws. These governments also have limited budgets. In some cases, cleanup costs are diverted from fire and police funds: but they are paid nonetheless.

There is no question that cleanup will be expensive. But removing or reducing the best enforcement tool does not address the cost of cleanup. It merely casts doubt on whether there will be cleanup.

Officials from many States around the country have repeatedly testified that the Federal government is the worst violator of pollution control laws in their State. If Earth Day had a true impact on these agencies, they would not be asking for an enforcement exemption, they would be asking Congress for more money for cleanup.

It is ironic that it is only the Federal government that complains it cannot afford to remedy its own environmental problems. If private industry sat before this Committee and asked for an exemption for enforcement actions because it cost too much to clean up their contamination, it is unlikely that such relief would be forthcoming.

The Federal government may well have to spend billions of dollars to clean up its hazardous waste sites. These were preventable costs. But a false sense of economy prevailed, and now the public will be asked to wait and bear the additional public health risks.

S. 1140 does not ask us to change the law, it only asks clarification of what is clearly stated in RCRA already. United States District Judge Gene Carter, in the case of the *State of Maine* v. *Department of Navy* (702 F.Supp. 322) "wholeheartedly" concurred with the statement of the Magistrate that: an intelligent person reading the statute would think the message plain: Federal facilities will be treated the same as private institutions so far as enforcement of the solid waste and hazardous waste laws are concerned. . . . It is hard to imagine clearer language short of listing every possible variation of such requirements." (at 326)

Section 6001 in relevant parts states that all Federal agencies: shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions or injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements . . .

As Judge Carter also noted:

Having waived immunity explicitly, albeit generally, to the specified "requirements" there was no need for Congress to proceed to describe an explicit waiver of every conceivable "requirement" comprehended in the described generic category, "requirements".

Indeed, it would be nonsensical to require Congress to make a detailed punchlist of all of the "requirements" set out in the entire body of environmental law of the Federal government and each of the fifty states. (at 327, emphasis added)

The logic is compelling. S. 1140 merely removes any question about Congress' original intent. This is the policy embodied in our other environmental laws and it is appropriately the policy in our hazardous waste laws.

Issues raised by the Administration are more properly focused on the large cost of paying to clean up contamination created by the Federal government. This is an appropriate and important issue, but it is of course separate from the primary issue of coverage of the law.

Mr. Chairman, S. 1140 addresses only a small part of our RCRA problem. In the next Congress will reauthorize RCRA. Let us use the time between enactment of S. 1140 and RCRA reauthorization to explore these other issues further. Meanwhile, we should clarify that the Federal government is not above the law so that citizens will be as protected from environmental contamination by the Federal government as they are protected from private industries.

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John K. Van de Kamp
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90 MAY 14
OFFICE OF SENATOR

May 1, 1990

The Honorable Quentin N. Burdick
United States Senate
Senate Office Building
Washington, DC 20515

Dear Senator Burdick:

I understand that the Senate Committee on Environment and Public Works will soon hold hearings on S 1140, which would waive the sovereign immunity of the United States under the Resource Conservation and Recovery Act (RCRA). This is a priority issue on the agenda of the National Association of Attorneys General and I join with my colleagues in expressing my enthusiastic support for enactment of this legislation.

S 1140 is needed to ensure that federal agencies comply with state and federal laws so that they manage their hazardous waste in a safe manner and to guarantee proper management of federal facilities in the future. Ensuring environmental compliance now will save the taxpayers millions of dollars in potential clean up costs in the future.

For example, in California, I have filed lawsuits on behalf of the Department of Health Services to stop violations of state and federal hazardous waste laws at Fort Ord, the Alameda Naval Air Station, and the Mare Island Naval Shipyard. In each of these cases, inspections of the federal facilities revealed continuing and widespread violations of hazardous waste laws that protect public health and safety and the environment from toxic wastes. At Fort Ord alone, for instance, state and federal inspectors uncovered more than 350 separate illegal practices. Moreover, the Department is investigating violations at many other federal facilities in California which have not yet reached the point of referral to our office for the filing of a lawsuit. The fiscal, environmental, and public health impacts of failing to remedy these violations promptly are potentially enormous. For this reason, there is widespread agreement among Californians that violations of these laws must not be tolerated.

Penalties are essential in obtaining compliance with the laws as well as for providing a deterrent factor against future violations. The threat of a civil penalty is an essential tool in the state's enforcement arsenal. Other environmental acts, such as the Clean Air Act, the Medical Waste Tracking Act, and the Safe Drinking Water Act all waive federal sovereign immunity for civil penalties against federal facilities. That authority has not been used in a way that would somehow raid the federal treasury, and I do not believe that that would occur under this act. The states have acted responsibly on this matter in the past and the amount of fines and penalties has not been excessive. The states, I strongly believe, will continue to act responsibly on this matter in the future.

I urge you to vote for S 1140 and to speak out actively in its support. Please feel free to contact me for further information or call Lynne Ross, NAAG Deputy Director and Legislative Director, who can be reached at (202) 628-0433.

Thank you for the consideration of my views.

Sincerely,

JOHN K. VAN DE KAMP
Attorney General

rmt

cc: Congressional Delegation
Lynne Ross

State of Connecticut

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

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May 2, 1990

The Honorable Quentin N. Burdick
United States Senator
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Burdick:

The Senate Environment and Public Works Committee is considering S 1140. I am writing to urge your support for this bill which would clarify the waiver of federal sovereign immunity under the Resource Conservation and Recovery Act (RCRA). One of the primary purposes of S 1140 is to expressly allow states to pursue administrative, as well as judicial, enforcement actions with respect to federal facilities. The National Association of Attorneys General (NAAG) has endorsed this legislation because it will facilitate greater compliance with state and federal environmental laws by federal facilities. We urge you to support S 1140 and to oppose any amendments that would undermine the state's ability to enforce state and federal environmental laws. Please make this letter part of the public hearing record.

RCRA is critical to state protection of our environment from improper handling and disposal of hazardous substances. The act currently applies to private citizens as well as state and local governments. With its strong enforcement sanctions, RCRA is a key environmental protection tool for our office.

The federal government operates many facilities which use hazardous substances. In Connecticut, for example, the Naval Sub Base in Groton is a generator of hazardous waste and maintains a storage facility for such waste.

S 1140 states unequivocally that the federal government has waived sovereign immunity for violations of RCRA and similar state hazardous waste laws and, thereby, paves the way for federal liability under RCRA.

S 1140 establishes a good policy. Penalties are contained in most environmental statutes as a deterrent to potential violators and are useful incentives in protecting our state's water, land and air from being spoiled by any person or government. Congress has determined that such penalties are necessary for private citizens and state and local governments. If penalties are needed to ensure compliance for these organizations, then they will have a deterrent effect, as well, for the federal government.

I urge you to support S 1140 as drafted.

Sincerely,

C N Riddle

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

CNR:sk

cc: The Honorable Joseph I. Lieberman, United States Senator
The Honorable Christopher J. Dodd, United States Senator

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BURDICK

Duane Woodard
Attorney General
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May 1, 1990

The Honorable Quentin N. Burdick
Chairman, Senate Committee on Environment
 and Public Works
458 Senate Dirksen Office Building
Washington, D.C. 20510

RE: Support for S. 1140

Dear Chairman Burdick:

I write to express my strong support for S. 1140. This bill, if enacted, would enhance the ability of states and the EPA to enforce environmental laws at federal facilities. Presently, federal facilities are among the most heavily contaminated sites on the National Priorities List, in part because federal agencies are among the most recalcitrant offenders of environmental laws. Federal agencies, backed by the Department of Justice, have often raised the defense of sovereign immunity against state efforts to enforce environmental laws. They have similarly thwarted EPA efforts to enforce federal environmental laws by asserting that the "unitary theory of the executive branch" prevents EPA from unilaterally enforcing its laws against another federal agency.

Two of the most contaminated sites in the nation are federal facilities located in Colorado. The Rocky Mountain Arsenal, owned by the United States and managed by the Department of the Army, is a 27 square-mile facility located just east of Denver. The extensive contamination from the Arsenal, both on- and off-site, is the result of decades of improper waste disposal related to the manufacture of nerve agent, herbicides and pesticides. Colorado has been in litigation with the Army for several years, arguing that the state's hazardous waste laws apply at the facility. Despite a federal district court ruling in the State's favor in February 1989, the Army has so far refused to acknowledge the state's authority.

To the northwest of Denver lies the Department of Energy's Rocky Flats Plant. Although DOE has been considerably more cooperative than the Army, particularly since Admiral Watkins became

Secretary, the Rocky Flats facility has nonetheless been plagued with environmental violations, and has been slow to respond to the state's authority. The recent report of the joint NAAG-NGA Task Force on Federal Facilities contains a brief description of the DOE's resistance to state efforts to regulate hazardous wastes at its facilities nationwide.

S. 1140 would provide states with an essential enforcement tool. Civil and administrative penalties have proved to be effective deterrents against state and local governmental entities, as well as private firms. It is certainly anomolous, if not unfair, for states and local governments to be subject to EPA-imposed penalties, while federal agencies assert an exemption from state-imposed penalties.

As the NAAG-NGA Task Force Report notes, federal facilities' non-compliance with environmental laws is pervasive. Nonetheless, allowing states to impose fines for federal agencies' violations of state hazardous waste laws will certainly not amount to a "raid on the federal treasury" as feared by some commentators. States have enjoyed such authority for many years under the Clean Air Act and the Safe Drinking Water Act, and have exercised it in a responsible manner. Moreover, in the long run, the deterrent effect of civil penalties increases compliance and saves money in avoided cleanup costs.

Recently, opponents of S. 1140 have been heard to say that it will encourage litigation. I find that argument unpersuasive. Federal agencies are already litigating state enforcement efforts, including efforts to impose penalties. Far from encouraging litigation, S. 1140 will clarify questions about the legislative intent and thereby encourage federal agencies to comply with environmental laws in the first place. This will, in turn, reduce the need to litigate either the existence of a violation or the appropriate penalty. And when violations do occur, state regulators and federal agencies will have the opportunity--presently unavailable because of the Justice Department's position--to negotiate a penalty amount that will accomplish the deterrent effect but avoid litigating the immunity question. Colorado has had good success negotiating penalty assessments with private firms.

Nor should the availability of civil penalties affect the negotiation of the Interagency Agreements (IAGs) required under

CERCLA section 120 for federal facilities on the National Priorities List. The investigation and cleanup schedules contained in IAGs are, at a minimum, enforceable under the citizen suit provisions of CERCLA. CERCLA authorizes states to bring citizen suits, and authorizes the court, in such a suit, to impose civil penalties. Thus, federal agencies are already subject to state-imposed penalties for violating cleanup schedules in an IAG.

Moreover, many of the facilities required to negotiate IAGs are already subject to the corrective action provisions of RCRA and analogous state laws. Several IAGs, such as the ones for Hanford and Rocky Flats, integrate the federal agency's obligations under RCRA and CERCLA. These agreements have provided a means to coordinate the IAG cleanup schedules with the RCRA corrective action schedules to ensure consistency between the two. The states have thus shown a willingness to work with federal agencies and EPA to accommodate all parties' interests in cleaning up federal facilities. This cooperative attitude belies the concern that states would abuse their RCRA corrective action authority. Clarifying the waiver of sovereign immunity will increase EPA's and the the affected federal agency's incentive to integrate the cleanup requirements of RCRA and CERCLA, and will thus result in enhanced cooperation.

In short, passage of S. 1140 will provide a needed incentive to federal agencies to cooperate with states and EPA in ongoing hazardous waste management, as well as cleanup of past contamination. I urge you to support this legislation, and to move it swiftly through your committee.

Sincerely,

Duane Woodard

Duane Woodard
Attorney General

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STATE OF FLORIDA
OFFICE OF ATTORNEY GENERAL
ROBERT A. BUTTERWORTH

May 1, 1990

The Honorable Quentin N. Burdick
United States Senator
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Burdick:

This is to advise you of my support of legislation to help ensure that federal facilities comply with environmental laws. S. 1140, which is pending in the Environment and Public Works Committee, would clarify the waiver of federal sovereign immunity under the Resource Conservation and Recovery Act (RCRA). Your support for this bill would be very much appreciated. I request that you make this letter part of the public hearing record on this issue.

Some of the worst hazardous waste sites, and some of the most difficult hazardous waste management problems, involve federal facilities. Federal agencies should comply with the same standards that apply to private industry, state agencies and municipalities. However, the states have been frustrated in their efforts to hold federal agencies accountable under environmental laws.

In Florida, for example, state enforcement efforts to rectify continuing RCRA problems at federal facilities have been frustrated by assertions of sovereign immunity. Many of these problems have been documented in a report prepared by the Department of Environmental Regulation which was recently forwarded to your office.

S. 1140 will strengthen the states' ability to ensure that federal facilities comply with the law. The option of civil penalties as contemplated under S. 1140 is an essential enforcement tool for states to use in their environmental programs established to protect human health and the environment. Civil penalties help get the federal government's attention, induce compliance, and deter future misconduct. I can think of no sound public policy reason which would require the exemption of federal facilities from assessments for violations of state standards.

The National Association of Attorneys General has recommended that a more coordinated partnership between federal and state government be undertaken to protect the environment. I believe that S. 1140 would be an important step in this direction.

If you or your staff have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/br

cc: The Honorable Bob Graham
The Honorable Connie Mack

JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL

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May 1, 1990

The Honorable Quentin N. Burdick
Chair, Environment and Public Works Committee
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Burdick:

The State of Hawaii wishes to express for the record for the passage of S. 1140, which would clarify provisions concerning the application of certain requirements and sanctions to Federal facilities which would explicitly waive federal sovereign immunity under the federal Resources Conservation and Recovery Act (RCRA) and, also, restore the Environmental Protection Agency's ability to use administrative orders to resolve regulatory violations at federal facilities.

We in Hawaii firmly believe that S. 1140 is needed 1) to ensure that federal agencies comply with state and federal laws so that they manage their hazardous wastes in a safe manner; 2) to subject federal facilities to the same accountability and substantive enforcement provisions that apply to state and local governments and private concerns; and 3) to guarantee proper management of federal facilities in the future.

Thank you for giving the State of Hawaii an opportunity to voice its support for S. 1140.

Very truly yours,

Warren Price, III
Attorney General

WP:EPW/ssm
cc: Honorable Daniel K. Inouye, U.S. Senator
    Honorable Daniel K. Akaka, U.S. Senator
    Lynne Ross, NAAG

STATEMENT OF

JIM JONES
ATTORNEY GENERAL
STATE OF IDAHO

BEFORE
THE ENVIRONMENT AND PUBLIC WORK COMMITTEE
UNITED STATES SENATE

CONCERNING
SENATE BILL 1140

MAY 1, 1990

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

I am Jim Jones, Attorney General of the State of Idaho and Chairman of the National Association of Attorneys General Environment Legislative Subcommittee. I appreciate the opportunity to provide testimony to you today on behalf of my state and the National Association of Attorneys General in support of S. 1140. We fully support this legislation which clarifies the waiver of federal sovereign immunity under the Resource Conservation and Recovery Act (RCRA) by specifically providing that federal facilities are subject to the same state enforcement actions as any other entity, including administrative orders and civil and administrative penalties and fines.

As a matter of routine practice, federal facilities generate, manage and dispose of large quantities of hazardous waste. Two federal agencies, the Department of Defense (DOD) and the Department of Energy (DOE), together generate approximately 20 million tons of hazardous waste annually. It is widely acknowledged that federal facilities present some of the worst RCRA compliance problems in the country. President Bush recognized this serious federal facility noncompliance problem in a statement made prior to his election in Seattle, Washington on May 16, 1988. There he stated: "Unfortunately, some of the worst offenders are our own federal facilities. As President, I will insist that in the future federal agencies meet or exceed environmental standards. The government should live within the laws it imposes on others."

Senate Bill 1140 will enhance proper hazardous and solid waste management and disposal practices at federal facilities by providing states with the enforcement mechanisms necessary to ensure that federal agencies comply with applicable federal and state hazardous waste laws. This legislation is essential for states to effectively exercise their responsibilities as the primary enforcers of environmental laws and to adequately protect and maintain a safe and healthy environment for their citizens.

Generally, state regulatory control over federal facilities is dependent upon a clear and unambiguous waiver of federal sovereign immunity. Congress has consistently recognized the importance of federal facility compliance with federal, state and local environmental laws in protecting health, safety and the environment by specifically waiving federal sovereign immunity in federal environmental laws thereby allowing states to administer and enforce environmental regulatory programs. Waivers of federal sovereign immunity that specifically require federal agencies to comply with federal, state, interstate and local government laws and regulations just like any other person or nongovernmental entity are included in, among others, the Clean Air Act, the Clean Water Act, the Medical Waste Tracking Act and the Safe Drinking Water Act. Federal agency compliance with these federal laws, and parallel state laws, is obviously neither a new nor a radical concept.

Although these laws allow states to exercise regulatory authority over federal facilities, there has been substantial disagreement and much litigation between the federal agencies, particularly DOE and DOD, and states over the extent to which federal sovereign immunity has been waived. Most of the disagreement has centered on states' ability to enforce regulatory requirements through use of administrative enforcement authorities, including imposition of penalties. These disputes have resulted in costly, time-consuming, and often acrimonious litigation between states and the federal government that causes delay in environmental compliance, erodes public confidence in governments' ability to address serious environmental concerns, and severely impacts state enforcement budgets. Without administrative enforcement authority, many states must rely simply on arm twisting and public pressure to obtain federal facility compliance with applicable hazardous waste laws.

The situation is compounded by EPA's inability to take meaningful enforcement actions against recalcitrant federal agencies due to the "unitary executive" theory promoted by the Department of Justice. Under this theory, one federal agency is precluded from exercising judicial enforcement authority against another federal agency. Taken to a logical conclusion, this theory would stop EPA from enforcing interagency agreements, consent orders or memoranda of agreement entered into between EPA and another federal agency. Essentially this puts compliance at federal facilities on a voluntary basis. While states, local governments and private industry are held accountable for compliance with applicable hazardous waste laws, federal facilities are not. This double standard should be, and will be, eliminated by passage of this legislation.

S. 1140 is designed to enhance federal facilities' compliance with RCRA in two ways. First, the bill makes it absolutely clear that states have the right to enforce federal and state hazardous waste laws against federal agencies and to impose penalties for noncompliance. Second, the bill requires EPA to annually conduct thorough inspections of federal facilities for compliance with federal environmental laws and provides EPA with specific statutory authority to take administrative enforcement actions against federal agencies for violations.

Several objections to the provisions of S. 1140 have been raised, but these are without merit. Opponents have argued that the bill will permit states to raid the federal treasury through assessment of penalties. These opponents, however, cannot point to situations where states have acted irresponsibly in imposing penalties under similar waivers of sovereign immunity in other federal environmental laws. There is no reason to presume that states would act otherwise with respect to imposition of penalties for violations of RCRA. Over the past five to six years, forty states that have parallel RCRA provisions have attempted to collect only $500,000 in penalties from federal agencies. This cannot be construed, by any stretch of the imagination, as a raid on the federal treasury. In truth, the amount of the penalty primarily serves to focus public and congressional attention on the agency's noncompliance, thereby serving as an effective deterrent to future environmental noncompliance.

The federal government currently imposes penalties on states and local governments for noncompliance with federal environmental laws, while at the same time attempting to claim immunity from similar sanctions for itself. In the past five years, approximately 90% of the civil actions filed by the federal government against state and local governments for violations of environmental laws included civil penalties that in many cases exceed $100,000. In some cases the penalties sought by the federal government exceeded $1,000,000. At no time did the federal government dwell on the fiscal impact of the penalties on the state or local treasuries. Just as federal agencies obtain their revenues from taxpayer dollars, so do state and local governments. Just as the federal government must be fiscally responsible, so too must state and local governments be responsible. The argument that states will raid the U.S. treasury merely because they have the authority to impose administrative penalties is, simply stated, a smokescreen.

The deterrence value of administrative penalties, on the other hand, should not be underestimated. Under other environmental laws where states have penalty authority, there is a significant degree of federal facility compliance. According to EPA records, federal facility RCRA noncompliance may be as high as 55%, which can be contrasted with a 3% noncompliance rate for air emissions under the Clean Air Act and an 18% noncompliance rate for water discharges under the Clean Water Act.

Opponents to S. 1140 have also expressed concern that the bill would allow states to interfere in matters of national security; let me assure you it will not. A safeguard to address those limited situations where compliance with hazardous waste laws may raise legitimate national security concerns has already been included in the existing RCRA waiver of sovereign immunity provision set forth in section 6001. S. 1140 will not alter this precautionary provision which allows the President to "exempt any solid waste management facility of any department, agency or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so."

During the House debate opponents to the provisions of this bill also argued that federal cleanup priorities would be disrupted by the passage of such a bill. Only recently has the DOD identified over 8,000 sites potentially contaminated with hazardous materials and begun to grapple with the difficult, but necessary, task of putting in place a priority-setting system based upon a "worst-first" approach. The states have not disrupted this process, nor is there any plan to do so. Last fall the DOE issued its Five-Year Plan for Environmental Restoration and Waste Management. As stated in the plan itself, states and tribal governments worked with DOE on a cooperative basis in the formulation and evaluation of that plan and will continue to do so. Rather than impeding or disrupting the formulation of federal priorities for cleanup and compliance problems, allowing states full administrative enforcement authority of hazardous waste laws will assist in determining areas of noncompliance and will actually enhance the implementation of properly established priorities.

Because federal agencies have historically disregarded their responsibilities to comply with applicable environmental laws, public health and the environment have been endangered. This could have been avoided. To now hide behind the argument that dollars are scare ignores the facts that dollars will always be scare and cleanup can be extraordinarily expensive. The old adage "an ounce of prevention is worth a pound of cure" could hardly be more appropriately applied than it can be with respect to federal agency compliance with environmental laws. Rather than costing the treasury, the passage of S. 1140 will serve to retard the ever-growing cost of cleaning up contamination at federal facilities resulting from noncompliance with applicable environmental laws by recalcitrant federal agencies.

It is expected that it will take DOD at least 25 years and a budget in excess of $20 billion to clean up our military installations. The cost of cleanup at DOE facilities and the time to achieve such cleanup is equally staggering. Much of this cost might have been avoided if, from the outset, states had been able to effectively enforce environmental laws against federal agencies. Ensuring compliance now may save taxpayers millions of dollars in the future. S. 1140 provides both a carrot and a stick for enhanced federal facility compliance with federal and state hazardous waste laws.

The argument that allowing states to impose civil penalties might reduce funds available for compliance or cleanup or somehow skew the federal budget is also without merit. This is an argument advanced by anyone against whom a law is enforced and who may be required to pay a penalty for noncompliance. In a letter from the Office of Management and Budget (OMB) reviewing the budget impact of similar provisions in H.R. 1056, it was noted that total federal compliance costs over time could not be estimated, but it was thought unlikely that those costs would change significantly as a result of this bill. Compliance with environmental laws is now an accepted cost of doing business, at least by private industry. No one, least of all the federal government, should be able to benefit from noncompliance by escaping imposition of penalties for that noncompliance.

Passage of S. 1140 will accomplish three objectives, each of which furthers fair and effective environmental protection. First, it would end the double standard that currently enables federal facilities to avoid the legal accountability that applies to state and local governments and private industry. This would restore credibility to the federal government as a protector of the environment and as not believing it is above the law. Second, passage of the bill would promote appropriate hazardous waste management and disposal practices at federal facilities in the future by providing federal agencies with the incentive to internalize costs of environmental compliance at the front-end of projects. Third, the bill would establish penalty provisions that are essential to prompting federal agencies to comply with applicable hazardous waste laws. The threat of swift enforcement that stings, and the attendant publicity, will help assure that proper management procedures are in place to prevent problems from developing.

The issue of federal facility compliance with environmental laws is of vital importance to Idahoans. We in Idaho are now struggling with the difficult issues surrounding cleanup and compliance at federal facilities.

Idaho is home for DOE's Idaho National Engineering Laboratory (INEL). INEL was established in 1949 as an area for the testing of nuclear reactors, fuel reprocessing plants and support facilities related to national defense programs and other nuclear research activities. The citizens of Idaho are proud to be part of the nation's pioneering efforts in these areas. The INEL occupies approximately 890 square miles in southeastern Idaho and overlays the Snake River Plain aquifer, however, which is a primary drinking water source in southern Idaho. Thus, it is imperative that INEL activities be closely regulated and monitored to ensure that the significant quantities of radioactive, hazardous and mixed waste generated at the site do not contaminate the acquifer or natural resources.

Since as early as 1973 the federal government has been promising the people of Idaho that it would address threats to the environment created by past waste management practices at INEL. The promised actions have been delayed, postponed and rescheduled many times over the past 16 years, while the number of projects and waste generated and stored at the INEL continue to increase.

As a consequence of the federal government's unkept promises, the confidence of the people of Idaho in the INEL activities has severely eroded. In response to the public's concerns, the Idaho legislature has taken action to authorize the establishment of a comprehensive, independent state oversight and monitoring program for the INEL. Idaho is currently in negotiations with DOE for funding of the state's oversight program.

In addition to the INEL, there are many other federal facilities in Idaho that have been identified as having potential hazardous waste problems. These facilities vary in size and location and are under the administration of the Departments of Defense, Interior and Agriculture. Air emissions like contamination of soil and surface and ground waters are not subject to the whimsy of political jurisdictional boundaries. Passage of S. 1140 will give Idaho the ability to effectively regulate the safe management and disposal of hazardous waste for all of Idaho. Without this legislation, Idaho, like many other states, will be left in a position of hoping that federal facilities located within the boundaries of the state will voluntarily comply with hazardous waste laws because we simply do not have the resources for protracted environmental litigation.

The time has come for providing states with the full complement of enforcement authorities. S. 1140 is a reasonable piece of legislation that will provide a greater degree of protection for public health and the environment and, at the same time, save scare budget dollars. I urge your full support of this bill as now presented to you for consideration.

STATE OF INDIANA
ATTORNEY GENERAL
INDIANAPOLIS, INDIANA
46204

LINLEY E. PEARSON
ATTORNEY GENERAL

RECEIVED BY
90 MAY 3 [illegible] 1

May 1, 1990

Honorable Quentin N. Burdick
United States Senator
Chairman, Senate Environment
and Public Works Committee
458 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Burdick:

I want to comment on S. 1140 for the record. Your Environment and Public Works Committee is holding hearings on S. 1140 which makes explicit the waiver of federal sovereign immunity under the Resource Conservation and Recovery Act (RCRA). This legislation is urgently needed. It will help to eliminate one of the ironies in the nation's efforts to clean up its hazardous waste problems. Federal agencies are frequently the most recalcitrant of polluters and comprise some of the worst contaminated sites in the country. States look to the federal government for leadership on this issue and federal agencies have been reluctant to acknowledge state authority over hazardous waste compliance and management activities. S. 1140 will clarify that federal agencies, like private industry and other governmental entities, are accountable under environmental laws and are subject to fines and penalties for violating state and federal hazardous waste laws. This accountability will be an important step in ensuring environmental compliance, which will help to save millions of dollars later on in clean-up costs.

S. 1140 is a priority issue on the legislative agenda of the National Association of Attorneys General. I heartily concur with this and urge that S. 1140 be adopted without weakening amendments. I hope that you will vote for this bill and speak out actively on its behalf.

If you or your staff have any questions, please feel free to call me or Lynne Ross, NAAG Deputy Director and Legislative Director, who can be reached at (202) 628-0433.

Very truly yours,

Linley E. Pearson

Linley E. Pearson
Attorney General of Indiana

LEP:lds

cc: Senators Lugar and Coats
Lynne Ross, NAAG

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ROBERT T. STEPHAN
ATTORNEY GENERAL

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May 1, 1990

Senator Quentin N. Burdick
Chair, Environment & Public Works Committee
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Burdick:

It has come to my attention that the Environment and Public Works Committee on which you serve is considering S. 1140, which would explicitly waive federal sovereign immunity under the Resource Conservation and Recovery Act (RCRA). This is important legislation that the National Association of Attorneys General supports. I write to encourage you to vote for it when the opportunity arises.

Some of the worst hazardous waste sites and some of the most difficult hazardous wastes management problems involve the federal facilities. One of the reasons is that federal agencies have not held themselves accountable for enforcement violations under RCRA. In Kansas, several Department of Defense facilities have had serious RCRA compliance problems. These include the following:

- Fort Riley, and the First Infantry Division in Ft. Riley, which had a series of closure plan and waste characterization violations associated with open detonation areas, solvents and caustic wastes, as well as waste battery acids between 1985 and 1988;
- Kansas Army Ammunition Plant, groundwater monitoring and closure post-closure violations on November 19, 1987;
- Smoky Hills Weapons Range, a closure/post-closure violation on September 23, 1988;
- Sunflower Army Ammunition Plant, groundwater monitoring violation on April 28, 1988; and,

- Fort Leavenworth and Combined Arms Center. At Fort Leavenworth the Kansas Department of Health and Environment attempted to assess a $3,000 penalty for non-compliance involving manifest violations related to shipments of hazardous waste. The Department of Defense opposed this penalty assessment on the grounds that "the waiver of sovereign immunity in Section 6001 of RCRA is not expressed in the requisite clear and unambiguous terms to provide authority" for such payments. (This is hardly an excessive penalty; the Fourth of July fireworks display that I have seen undoubtedly costs much more.)

S. 1140 will strengthen the states' ability in ensuring that federal facilities comply with the law and are properly managed in the future. I want to emphasize that the option of penalties is essential to enforcement efforts. Penalties will help get the attention of the federal government, induce compliance, and deter future misconduct by federal and other regulated agencies. While I appreciate the desire to ensure that DOE facilities have enough money for cleanup, S 1140 addresses RCRA compliance, which is a far less costly means to ensure compliance. I believe the states have and will continue to act responsibly to assessing penalties.

I hope you will support this legislation as now drafted and move it ahead as soon as possible. If you have any questions, please feel free to call me or my Association's legislative director, Lynne Ross, who can be reached at 202-628-0433. Thank you for your consideration of my views and those of the National Association of Attorneys General.

Sincerely,

Robert T. Stephan

Robert T. Stephan
Attorney General

RTS:bls
cc: Senator Bob Dole
Senator Nancy Landon Kassebaum
Lynne Ross, NAAG

90
FREDERIC J. COWAN
ATTORNEY GENERAL

COMMONWEALTH OF KENTUCKY
THE CAPITOL

BRENT L. CALDWELL
DEPUTY ATTORNEY GENERAL

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SAC DIRECTOR
DEBORAH G. WILSON, Ph.D.
CHILD SUPPORT ENFORCEMENT
VALERIE FORTI
COMMUNICATIONS
PHILIP G. MILLER
CHIEF ADMINISTRATOR
MARCIA RICHMOND MORGAN

April 30, 1990

Senator Quentin N. Burdick
Chairman
Environment and Public Works Committee
458 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Burdick:

I write in support of legislation, S. 1140, which is a key environmental enforcement tool for our state. S. 1140 would clarify the waiver of federal sovereign immunity under the Resource Conservation and Recovery Act (RCRA). This is important legislation that the National Association of Attorneys General supports. I write to encourage you to vote for it when the opportunity arises.

Some of the worst hazardous waste sites and some of the most difficult hazardous waste management problems involve federal facilities. One of the reasons is that federal agencies have not been accountable for enforcement violations under RCRA.

I view the waiver of federal sovereign immunity as a states' rights issue. It is indeed an anomaly that our state facilities and municipalities are subject to penalties imposed by the federal government for non-compliance with federal environmental laws while the reverse does not hold true.

S. 1140 will strengthen the states' ability in ensuring that federal facilities comply with the law and are properly managed in the future. I want to emphasize that the option of penalties is

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essential to enforcement efforts. Penalties will help get the attention of the federal government, induce compliance, and deter future misconduct by federal and other regulated agencies. While I appreciate the desire to ensure that federal facilities have enough money for cleanup, S. 1140 addresses RCRA compliance, which is a far less costly means to ensure compliance. I believe that the states have and will continue to act responsibly in assessing penalties.

I hope that you will support this legislation as now drafted and reject any weakening amendments. If you have any questions, please feel free to call me or my Association's legislative director, Lynne Ross, who can be reached at 202/628-0433. Thank you for your consideration of my views and those of the National Association of Attorneys General.

Sincerely,

Frederic J. Cowan

FREDERIC J. COWAN
ATTORNEY GENERAL

FJC:as
cc: Senator Wendell H. Ford
Senator Mitch McConnell
Lynne Ross, Nat'l. Assn.
of Attorneys General

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

RECEIVED BY
90 MAY -7 AM 11:13

May 1, 1990

The Honorable Quentin N. Burdick
Chair, Senate Environment and Public Works Cmte.
458 Dirksen Senate Office Bldg.
Washington, DC 20510

RE: S. 1140

Dear Senator Burdick:

I am writing in support of S. 1140 and request that this letter be made part of the hearing record for the bill. Federal agencies including the Department of Defense, the Department of Energy and the Department of Justice have asserted for several years that the largest generator of hazardous waste in this country must be treated differently from other generators. The Department of Justice has said this generator can't be sued by the U.S. Environmental Protection Agency. In fact, the Department of Justice has told the U.S. EPA that it cannot even issue enforceable orders against this generator. In the words of a former EPA official, the only method EPA has to encourage compliance by this generator is "jawboning." These same federal agencies also have asserted that states cannot assess civil penalties against this generator, either.

The generator, of course, is the federal government itself. By one estimate, the Department of Defense alone generates approximately 750,000 tons of hazardous waste each year, more than the annual production of waste by the five largest U.S. chemical companies combined.

If the historical record demonstrated careful management of these hazardous waste, states would have little reason to be concerned about federal agency compliance with RCRA. However, both the pre- and post-RCRA hazardous waste management record of federal agencies such as the Departments of Defense and Energy has not been good. Failure to carefully manage their hazardous waste has resulted in the need for a massive cleanup program that will cost billions of dollars to complete. Much of this cost could have been avoided by better compliance with environmental laws. Unfortunately, the roadblocks placed in the way of enforcement against federal agencies prevented effective oversight of these federal facilities.

Congress over a decade ago decided that this country could no longer tolerate the public health threats, the environmental destruction and the cost of cleanups resulting from improper management of hazardous wastes. The Resource Conservation and Recovery Act was passed with very strong enforcement authority to assure that the mistakes of the past would not be repeated. Comparable state laws have been adopted in most jurisdictions. EPA and the states have aggressively enforced hazardous waste laws against hundreds of private and public generators and facility operators exacting civil penalties and, increasingly, criminal penalties. These enforcement actions have an element of punishment for improper behavior, but their primary purpose is to ensure that hazardous waste is properly managed so that people, the environment and the public fisc are protected. It is indeed ironic that the one generator not subject to this clear enforcement policy is the federal government itself: the entity that should be the model for the compliance.

Certainly, some progress is being made in federal compliance with RCRA. But, many state and private generators and facilities have made even more dramatic progress in achieving compliance than the federal government. These state and private generators and facilities have not asked to be relieved of the potential of enforcement actions or penalties as a result of voluntary compliance efforts. Instead, they recognize that compliance efforts are stimulated by the threat that if these efforts don't continue, penalties could result. They know that if they do a good job in complying with RCRA, they need not worry about penalties. They also know that if their efforts wane, penalties may be the result.

A survey conducted in connection with the consideration of the House version of S. 1140, H.R. 1056, demonstrated that states have not abused their civil penalty authority. Further, penalty assessments are often determined under state penalty policies. These penalty policies are designed to ensure even-handed application of penalties by setting out the factors that will be considered in any penalty case whether a private operator, a state facility or the federal government is involved.

States have long argued that Congress has already clearly waived sovereign immunity for civil penalties under RCRA. Unfortunately, not all federal courts have agreed. It is now time for Congress to reaffirm the principle that all generators and facilities covered by RCRA are subject to the full range of enforcement authorities including penalties provided under state and federal law. By doing so in enacting S. 1140, Congress will ensure that public health and the environment are protected. Additionally, by providing for better oversight of federal agencies, Congress will help assure that the cleanup costs we are paying for yesterday's poor management of hazardous waste won't have to be paid again for tomorrow's poor management practices.

Best regards,

Hubert H. Humphrey III

HUBERT H. HUMPHREY, III
Attorney General

HHH:III:jp

ATTORNEY GENERAL
STATE OF MONTANA

Marc Racicot
Attorney General

Justice Building
Helena, Montana 59620

May 1, 1990

The Honorable Quentin N. Burdick, Chair
United States Senate
Environment and Public Works Committee
458 Dirksen Senate Building
Washington DC 20510

Dear Senator Burdick:

I am writing to urge your support for S 1140 now being considered by the Senate Environment and Public Works Committee. This bill would explicitly waive federal sovereign immunity under the federal Resource Conservation and Recovery Act (RCRA) and would restore EPA's ability to use administrative orders to resolve regulatory violations at federal facilities.

I believe that the time has come to put an end to the double standard by which state and local municipalities and private industry are held accountable under state and federal environmental laws while federal facilities are not. Such a step is the only way, in my view, to guarantee federal compliance with these important environmental laws. In addition, the severity of the hazardous waste problems experienced at federal facilities throughout the nation argues for the immediate elimination of this RCRA exception.

I understand that some critics of S 1140 have suggested that fines would not be an appropriate remedy for a federal violator under RCRA and that the payment of cleanup costs should be the exclusive remedy. However, penalties and cleanup costs are separate issues, with the first designed to have a deterrent effect and the second designed to remedy the immediate hazardous waste problem. The elimination of fines against federal facilities would only seem to perpetuate the double standard now existing between federal RCRA violators and other nonfederal violators.

Again, I urge you to support the passage of S 1140 as now drafted. I view the proposal as a means of enhancing both the equality and effectiveness of RCRA.

TELEPHONE: (406) 444-2026

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

cc: Senator Max Baucus
Senator Conrad Burns
National Association of Attorneys General, Lynne Ross
Montana Department of Health and Environmental Sciences

State of Nevada
Office of the Attorney General
Carson City, Nevada 89710

BRIAN MCKAY
ATTORNEY GENERAL

April 30, 1990

The Honorable Quentin N. Burdick
Chairman
Committee on Environment and
Public Works
United States Senate
Washington, D.C. 20510-6275

Dear Senator Burdick:

I write to express my enthusiastic support for S. 1140. Passage of S. 1140 expressly subjects federal facilities to the same substantive enforcement provisions of the Resource Conservation and Recovery Act ("RCRA") that apply to state and local governments and private concerns. I can think of no sound public policy which would require the exemption of federal facilities from assessments for violations of state law and regulations.

Congress has specifically recognized that federal facilities come within the ambit of RCRA and has further recognized that hazardous waste violations at these facilities represent some of the worst environmental threats in the country. Despite this, federal agencies (notably the Department of Defense and the Department of Energy) continue to argue through their representatives at the Department of Justice that the federal government is not fully subject to state-administered RCRA programs, particularly the attempt by the states to impose civil penalties. Not only are the states hard pressed in their enforcement efforts against federal facilities, but the U.S. Environmental Protection Agency ("EPA") has failed to force its sister federal agencies into compliance. The result is a lack of accountability by the federal government at its facilities. S. 1140 clarifies the ability of the states to achieve uniform compliance for all "persons" including the United States with the hazardous waste laws and, therefore, works toward the achievement of the Congressional objectives of RCRA.

The State of Nevada through the Division of Environmental Protection has administered a hazardous waste program since 1981 and obtained federal RCRA delegation in 1985. Since that time, Nevada has barely discovered "the tip of the iceberg" with respect to hazardous waste violations relating to federal facilities, particularly on the almost four million acres of

Nevada withdrawn from public use for Department of Defense and Department of Energy purposes. The Nevada Division of Environmental Protection currently is involved in hazardous waste investigations which could lead to enforcement actions against the U.S. Air Force, the U.S. Navy, and the U.S. Army. It expects to pursue RCRA actions against the Department of Energy as violations surface in and around the Nevada Nuclear Test Site.

Along with my fellow attorneys general, I find it incomprehensible that the federal government has sought to shield itself by raising the specter of "sovereign immunity" when Congress expressly waived this immunity in RCRA. Nevada shares with the other states a history of frustration in attempting to rectify environmental problems at federal facilities. At the Nellis Air Force Base in Nevada, waste solvents and fuels have contaminated ground water. On the Nellis Bomb Range, unexploded missiles, bombs, and rockets pose considerable risks to the environment, particularly the ground water. At the Fallon Air Station, the Navy has created similar hazards with its attempts to dispose of solvents and fuels. The Hawthorne Army Ammunition Plant has openly detonated bombs in need of disposal and has created potential risk to the health and well being of the public. DOE has disposed of both hazardous and mixed radioactive waste at the Test Site, which threaten the State's ground water. Until recently, rather than cooperation from the federal agencies involved, the State has met with recalcitrance and an attitude that the federal polluters are somehow insulated from State regulation.

With passage of S. 1140, the waiver of sovereign immunity is indisputable. S. 1140 takes away the federal government's incentive to litigate rather than remediate the environmental calamaties it has caused. The unfortunate ambiguity of the existing waiver of sovereign immunity has resulted in a waste of effort for both the states and the federal government. Arguing nonsubstantive "jurisdictional" claims results in inefficient and, at times, counterproductive enforcement efforts. The nation can ill afford to sacrifice protection of the environment to allow the federal government special status to pollute.

I urge members of the Committee to support S. 1140 and move this bill forward as soon as possible.

Sincerely,

Brian McKay

BRIAN McKAY

/cj

cc: The Honorable Richard Bryan
The Honorable Harry Reid

STATE OF NEW YORK
DEPARTMENT OF LAW
120 BROADWAY
NEW YORK, N.Y. 10271

ROBERT ABRAMS
ATTORNEY GENERAL

April 30, 1990

Honorable Quentin N. Burdick, Chairman
Senate Committee on Environment and
Public Works
SD-458 Dirksen Senate Office Building
Washington, D.C. 20510-6175

Dear Chairman Burdick:

I am writing to urge the passage of S. 1140. The enactment of this amendment to the Resource Conservation and Recovery Act (RCRA) would make clear that federal facilities are subject to the same substantive enforcement provisions as apply to state and local governments and private concerns.

New York State is home to numerous federal facilities which, like their state and local government counterparts, must comply with various federal environmental laws such as RCRA, as well as with State and local laws respecting the control and abatement of solid and hazardous waste disposal. Unfortunately, there has been a pattern of disregard for environmental regulations by some federal facilities in New York.

For example, in 1987 the EPA, pursuant to RCRA, cited the U.S. Military Academy at West Point for violations of the State's solid and hazardous waste regulations. In addition, New York has cited West Point for violations concerning air emissions, point source discharges, and the failure to obtain SPDES permits. Although the Academy has undertaken efforts to correct these violations, to date, the question of civil penalties has yet to be resolved.

The passage of S. 1140 would provide a needed incentive for federal facilities to comply with the law. There should be no double standard regarding government facilities and the environment. Federal facilities which improperly store, transport or dispose of solid and hazardous waste should be clearly subject to the same sanctions as those of state or local entities. The public's health and the safety of our environment should not be made to depend upon the ownership of the particular facility causing the harm.

As I urged the passage of H.R. 1056 last year in the House, I now urge passage of S. 1140 in the Senate.

Sincerely,

Robert Abrams

ROBERT ABRAMS

cc: Honorable Daniel Patrick Moynihan
Honorable Alfonse M. D'Amato

State of North Carolina
Department of Justice
P.O. BOX 629
RALEIGH
27602-0629

LACY H. THORNBURG
ATTORNEY GENERAL

May 1, 1990

Senator Quentin N. Burdock
Chairman, Environment & Public Works Committee
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Burdock:

I understand that the Environment and Public Works Committee which you chair is considering S1140, which would explicitly waive federal sovereign immunity under the Resource Conservation and Recovery Act (RCRA). I support enactment of S1140, and I write to encourage you to use your leadership to move this bill ahead as soon as possible.

Some of the worst hazardous waste sites and some of the most difficult hazardous waste management problems involve federal facilities. One of the reasons is that federal agencies have not held themselves accountable for enforcement violations under RCRA. In North Carolina, several Department of Defense facilities have had serious RCRA compliance problems. These include the following:

- The U.S. Army's Fort Bragg Airborne Cops had manifest system and land ban violations as recently as January 17 of 1989.
- The Marine Corps Cherry Point Air Station had groundwater monitoring violations as of June 24, 2988.
- The Marine's Camp Lejeune Building 1108 has had manifest and compliance schedule violations as recently as September 28, 1988.
- The Coast Guard's Elizabeth City Support Center has had groundwater monitoring, closure plan and compliance schedule violations at least until March 23rd of 1988.

S1140 will be very helpful to the State of North Carolina. It will strengthen the states' ability in ensuring that federal facilities comply with the law and are properly managed in the future. I want to emphasize that the option of penalties is essential to enforcement efforts. Penalties will help get the attention of the federal government, induce compliance, and deter future misconduct by federal and other regulated agencies. While I appreciate the need to ensure that federal facilities have enough money for cleanup, S1140 addresses RCRA compliance, which is a far less costly means to ensure compliance. I believe that the states have and will continue to act responsibly in assessing penalties.

I hope that you will support this legislation. If you have any questions, please feel free to call me or my Association's legislative director, Lynne Ross, who can be reached at (202) 828-0433. Thank you for your consideration of my views and those of the National Association of Attorneys General.

Sincerely,

LACY H. THORNBURG
Attorney General

LHT/ld

cc: Senator Sanford
Senator Helms
Lynne Ross, Nat'l. Assn. of Attorneys General

DAVE FROHNMAYER
ATTORNEY GENERAL
STATE OF OREGON

JAMES E. MOUNTAIN, JR.
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400

Via Federal Express

April 26, 1990

The Honorable Quentin Burdick, Chair
Senate Environment and Public Works
  Committee
United States Senate
Room 511/Senate Hart Office Building
Washington, D.C. 20510

Re: S. 1140

Dear Senator Burdick:

I understand that S. 1140 will come before your committee for hearing on May 2, 1990. I am writing to express my strong support of this legislation. I supported the House version, H.R. 1056, that passed the House on July 19, 1989. I believe such legislation is important to ensure that federal facilities comply with environmental laws. Federal agencies should abide by the same standards that apply to private industry, state agencies and municipalities. Many states have been frustrated in their attempt to hold federal agencies accountable under environmental laws. At the same time, some of the worst hazardous waste sites and the most difficult hazardous waste management problems involve federal facilities.

I join with many of my colleagues around the country in the recommendation adopted by the National Association of Attorneys General in support S. 1140.

Sincerely,

Dave Frohnmayer
DAVE FROHNMAYER
Attorney General

DF:cm
cc: Lynne Ross, National Association of Attorneys General
8855a

State of Rhode Island and Providence Plantations
DEPARTMENT OF THE ATTORNEY GENERAL
72 Pine Street, Providence, RI 02903
(401) 274-4400
James E. O'Neil, *Attorney General*

RECEIVED BY

May 3, 1990

Honorable Quentin N. Burdick
Chair, Environmental and Public Works Committee
United States Senate
458 Senate Dirksen Office Building
Washington, D.C. 20510-3902

Dear Senator Burdick:

I write in support of legislation which we need in the states to help us enforce environmental laws with respect to federal facilities. S. 1140, a bill which would clarify the waiver of federal sovereign immunity under the Resource Conservation and Recovery Act, is pending before your Environmental and Public Works Committee, and I would appreciate your making this part of the public hearing record. I am pleased that your Committee is holding hearings and hope that you will move this bill ahead as soon as possible.

This issue is of great concern to me as well as my colleagues around the country. The similar House bill, H.R. 1056, passed the House last July. S. 1140 will help ensure that federal facilities are accountable under our environmental laws. I believe that federal facilities should be subject to the same sanctions that private industry and state and local governments have to bear when they violate the environmental laws. This is only fair.

In my view, the states have exercised their enforcement authority responsibly regarding federal facilities and will continue to do so. However, if in the future, you believe that the states have not acted responsibly with respect to fines and penalties against federal facilities, I would encourage the Congress to revisit this issue at that time.

Please feel free to call me if I can provide you with any additional background.

With best personal regards, and

Very truly yours,

JAMES E. O'NEIL
Attorney General

JEO/NTL/cac

THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

May 1, 1990

Senator Quentin N. Burdick
Chair, Environment & Public Works Committee
458 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Burdick:

I understand that your Environment & Public Works Committee has scheduled hearings on S.1140, which explicitly waives the sovereign immunity of the United States for civil and administrative penalties under the Resource Conservation and Recovery Act (RCRA). This is a priority issue on the agenda of the National Association of Attorneys General, and I join with my colleagues in expressing my enthusiastic support for this legislation. Please add my letter to the public hearing record on this issue.

S.1140 is needed to ensure that federal agencies are subject to the same accountability and substantive enforcement provisions that apply to state and local governments and to private industry. Ensuring environmental compliance now will save the taxpayers millions of dollars in potential cleanup costs in the future.

In Texas, several federal facilities have had serious RCRA compliance problems. These include the following:

> In the case of *State of Texas v. United States Department of the Navy, et al.*, No. C-85-363, in the United States District Court for the Southern District of Texas, the State of Texas alleged a series of hazardous waste violations occurring over a period of many years at the Corpus Christi Naval Air Station. The principal violations occurred between 1983 and 1985 and included storing and disposing of hazardous wastes improperly, failing to notify the state of all hazardous wastes at the site, and improperly manifesting hazardous wastes for shipment off-site. The case was settled by a Consent Decree entered November 19, 1986, which required injunctive relief but no civil penalty. The State agreed to settle with-

512/463-2100 SUPREME COURT BUILDING AUSTIN, TEXAS 78711-2548

> out a civil penalty, against its normal policy, because of the sovereign immunity argument raised by the federal government.
>
> On November 28, 1987, USAFB Bergstrom was cited for storing hazardous waste, including waste slop oil, without a permit; for inadequate closure and post-closure plans for tanks containing solvents and waste oils; and for discharging pesticide wastes onto soils without a permit.
>
> On February 16, 1988, USAFB Dyess was cited for managing hazardous wastes without a permit, for failing to notify the Texas Water Commission of waste management activities, for managing hazardous wastes in such a manner as to cause or to threaten to cause a discharge to waters in the state, and for failing to properly manifest or characterize wastes managed and stored at the facility.
>
> On March 23, 1989, the Texas Water Commission found that USAFB Kelly was in violation of the law for inadequate groundwater monitoring on a waste oil pit, for lack of closure or remediation plan for underground storage tanks that had released chlorinated solvents to the environment, for failing to notify the Texas Water Commission that it was storing hazardous wastes, and for storing hazardous wastes without a permit. In this case, as in the Corpus Christi Naval Air Station case, the order called for compliance with the law but did not include civil or administrative penalties.

As this history of violations points up, penalties are essential for obtaining compliance with the law. The threat of a civil penalty is an essential tool in the state's enforcement arsenal. The State of Texas is subject to penalties by the federal government for hazardous waste violations. In order fully to protect human health and the environment, the converse should also hold true.

The waiver of federal sovereign immunity is not a new approach. Other environmental acts, such as the Clean Air Act, the Medical Waste Tracking Act of 1988 (subtitle J), and the Safe Drinking Water Act, all waive federal sovereign immunity for civil penalties against federal facilities. The states have acted responsibly under these acts in the past. The states, I strongly believe, will continue to act responsibly in the future and will not use penalties to skew cleanup priorities or raid the federal treasury.

I urge you to vote for S.1140 and to speak in its support. For further information, please feel free to contact me or Nancy Lynch, Chief, Environmental Protection Division, who can be reached at 512/463-2012.

Thank you for your consideration of my views.

Sincerely,

Jim Mattox

Jim Mattox
Attorney General of Texas

cc: Senator Lloyd Bentsen
Senator Phil Gramm

JEFFREY L. AMESTOY
ATTORNEY GENERAL
BRIAN L. BURGESS
DEPUTY ATTORNEY GENERAL
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May 14, 1990

The Honorable Quintin N. Burdick
Environment & Public Works Committee
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Burdick:

This letter is written in suport of S.1140, a bill to amend the Solid Waste Disposal Act to clarify provisions concerning the application of the law to federal facilities.

As Chair of the National Association of Attorneys General (NAAG) Environmental Committee, I wish to take this opportunity to voice my support of a federal policy that would subject federal facilities to the same substantive enforcement provisions that apply to state and local governments and private entities. S.1140 would, in my judgment, accomplish three substantive objectives, each of which furthers our mutual interest in fair and effective environmental protection.

1. S.1140 would end the double standard that currently enables federal facilities to avoid the legal accountability that applies to state and local government and private industry.

2. S.1140 would promote proper environmental management of federal facilities in the future.

3. S.1140 would establish penalty provisions that are essential to prompting federal agencies to comply with applicable environmental laws.

While waiver of federal sovereign immunity is not to be done lightly, there is ample precedent for the waiver approach when it serves a compelling public policy need. For example, the Clean Air Act, and the Medical Waste Tracking Act of 1988 each permit the assessment of civil penalties against federal facilities.

The difficult task of cleaning up and protecting our environment cannot be achieved if, as a matter of federal policy, we exempt major polluters from the applicability of environmental laws. Regrettably, this situation currently exists because of the lack of accountability of federal facilities.

S.1140 is a major step forward for environmental protection. I respectfully urge its early consideration and approval.

Sincerely,

Jeffrey L. Amestoy
mee

JEFFREY L. AMESTOY
Attorney General

JLA/mee

cc: The Honorable Patrick J. Leahy
The Honorable James M. Jeffords

COMMONWEALTH of VIRGINIA
Office of the Attorney General

Mary Sue Terry

H. Lane Kneedler

Deborah Love-Bryant

K. Marshall Cook
Deputy Attorney General

R. Claire Guthrie
Deputy Attorney General

Gail Starling Marshall
Deputy Attorney General

Stephen D. Rosenthal
Deputy Attorney General

May 1, 1990

The Honorable Quentin N. Burdick
The United States Senate
458 Senate Dirksen Office Building
Washington, D. C. 20510-4601

Dear Senator Burdick:

I write to express my support for legislation, S. 1140, which would clarify the waiver of federal sovereign immunity under the Resource Conservation and Recovery Act. I would appreciate your including this letter in the public hearing record.

Virginia has been authorized under RCRA § 3000 to administer and enforce its hazardous waste program since 1981. There are many federal facilities in Virginia; in fact, since 1981, Virginia has taken enforcement action against approximately 10 facilities. The focus of our enforcement program has been on administrative civil penalties, which are essential to an effective enforcement program. Civil penalties encourage compliance. I can think of no sound public policy which would require the exemption of federal facilities from assessments for violations of state law regulations.

S. 1140 would give Virginia and other states an important enforcement tool to use in their programs designed to protect human health and the environment. This issue is of great concern to me as well as my colleagues around the country. Enclosed is another copy of the letter sent to Representative Luken in support of the similar House bill, H.R. 1056, which the House passed last July.

Your help in securing passage of this bill as soon as possible would be appreciated. Please feel free to call me or Deputy Attorney R. Claire Guthrie, if we can provide you with any additional background.

With best personal regards, I am

Very truly yours,

Mary Sue Terry
Attorney General

612-328/hne/249

cc: The Honorable L. Douglas Wilder, Governor

The Honorable Elizabeth H. Haskell
Secretary of Natural Resources

Deputy Attorney General R. Claire Guthrie

Cynthia V. Bailey, Director
Department of Waste Management

COMMONWEALTH of VIRGINIA
Office of the Attorney General

Mary Sue Terry
Attorney General

H. Lane Kneedler
Chief Deputy Attorney General

R. Claire Guthrie
Deputy Attorney General
Human & Natural Resources Division

Gail Starling Marshall
Deputy Attorney General
Judicial Affairs Division

Walter A. McFarlane
Deputy Attorney General
Finance & Transportation Division

Stephen D. Rosenthal
Deputy Attorney General
Criminal Law Enforcement Division

Deborah Love-Bryant
Executive Assistant

April 3, 1989

The Honorable Thomas A. Luken
Congress of the United States
U. S. House of Representatives
Chairman
House Transportation and Hazardous Materials Subcommittee
House Annex 2
Washington, D. C. 20515

Dear Chairman Luken:

I write to express my support for H. R. 1056 which would explicitly waive federal sovereign immunity under the Resource Conservation and Recovery Act of 1976 (RCRA) and subject federal facilities to the same fines and penalties to which local governments and private industry are subject.

Virginia has been authorized under RCRA § 3006 to administer and enforce its hazardous waste program in lieu of the federal program since 1981. There are many federal facilities in Virginia; in fact, since 1981, Virginia has taken enforcement action against approximately ten federal facilities. The focus of our enforcement program has been on administrative enforcement. Many companies have agreed to administrative enforcement orders, some of which have required the payment of civil charges in lieu of penalties, because they realized they were subject to civil penalties in a judicial enforcement action. On the other hand, some federal facilities in Virginia have been slow to comply with our regulatory program because they realized they were not subject to civil penalties.

Civil penalties are essential to an effective enforcement program. The manager of a private facility is more likely to comply with statutory and regulatory requirements when he knows he must answer to his superiors and/or stockholders for the payment of civil penalties. Similarly, a federal official is more likely to pay attention to regulatory enforcement if he is accountable to his superiors for the payment of civil penalties. The primary purpose of civil penalties is not to enrich the state but to encourage compliance, a purpose that applies as equally to federal facilities as it does to private

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facilities.

In Virginia civil penalties and civil charges assessed for violation of solid and hazardous waste laws are payable to the Virginia Solid and Hazardous Waste Contingency Fund. That fund is used to defray the cost of responding to solid or hazardous waste incidents, clean-up of sites that have been improperly managed, and identification of parties responsible for such mismanagement. I can think of no sound public policy which would require the exemption of federal facilities from assessment for violations of state law and regulations.

As you know, federal facilities are not exempt from the assessment of civil penalties under the Clean Air Act. I am not aware that the availability of civil penalties under that Act has resulted in any unfair or disproportionate imposition of penalties against federal facilities either in Virginia or in other states. Moreover, passage of H. R. 1056 would help bring some consistency to environmental enforcement programs.

H.R. 1056 will give Virginia and other states one more enforcement tool to use in their programs designed to protect human health and the environment. I enthusiastically support H. R. 1056 and ask you to do the same.

Thank you for the opportunity to put my position on the record.

Very sincerely,

Mary Sue Terry

6:3-c7/307F

cc: The Honorable John W. Warner
The Honorable Charles S. Robb
The Honorable Herbert H. Bateman
The Honorable Owen B. Pickett
The Honorable Thomas J. Bliley, Jr.
The Honorable Norman Sisisky
The Honorable L. F. Payne, Jr.
The Honorable James R. Olin
The Honorable D. French Slaughter, Jr.
The Honorable Stanford E. Parris
The Honorable Frederick C. Boucher
The Honorable Frank R. Wolf
Lynne Ross, Deputy Director, NAAG

STATEMENT OF

KENNETH O. EIKENBERRY

ATTORNEY GENERAL

STATE OF WASHINGTON

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION,

TOURISM, AND HAZARDOUS MATERIALS

MAY 2, 1990

Good morning, Mr. Chairman. I am Ken Eikenberry, Attorney General for the State of Washington. I am pleased today to present my views on S. 1140, a clarification of the waiver of sovereign immunity in the Resource Conservation and Recovery Act (RCRA). This issue is of vital importance to me and to the citizens of the State of Washington.

To begin with, I would like to summarize my remarks for the committee.

* First, as Congress has stated many times, the federal government should be required to comply with federal and state environmental laws, including RCRA, to the same extent and in the same manner as any other person, private business, or state and local government;

* Second, the federal government has failed to comply with such state and federal environmental laws and has quite successfully resisted most efforts by states and citizens to enforce these requirements;

* Third, S. 1140 is absolutely necessary to insure the states' ability to enforce compliance with these statutes at federal facilities;

* Fourth, swift enactment of S. 1140 is especially important to the State of Washington in light of the recent agreement which was reached regarding the Hanford nuclear facility. S. 1140 is essential to insure that that agreement,

which took over a year to negotiate, is truly enforceable by the State.

To put my comments in some perspective, I would like to provide some background on the State's attempts to regulate the Hanford nuclear facility. I will use Hanford as a case study for my testimony, however, the committee should be aware that there are a large number of federal facilities in the State of Washington and my comments today regarding S. 1140 apply equally to all of them.

DESCRIPTION AND HISTORY OF USDOE AND HANFORD SITE COMPLIANCE ISSUES

* The Hanford Reservation began as the USA's first plutonium production facility in 1942.

* The Hanford Reservation is 570 square miles in size, and is located in south central Washington, near the cities of Richland, Pasco and Kennewick.

* The production of plutonium and other enriched nuclear materials is very waste intensive, i.e., very large volumes of hazardous, radioactive, and so-called mixed wastes are produced. Mixed wastes contain both radioactive and hazardous components.

* For most of its existence, DOE's waste management practices at Hanford have been crude, mostly consisting of dumping untreated wastes into unlined pits or directly into soil. In recent years, DOE's waste management practices have improved,

but remain out of compliance with the substantive requirements of RCRA and state hazardous waste laws.

* Highly radioactive mixed wastes have been placed into "temporary storage" in 149 single shell steel tanks on the Hanford site. Sixty-six of these tanks have been confirmed as "leakers," and the remainder are suspected of leaking. DOE estimates that 500,000 gallons of liquid waste have leaked from the single shell tanks at this time.

* There are 59 hazardous waste treatment, storage or disposal facilities (TSDs) on the site. These facilities are subject to permitting and cleanup requirements under RCRA and state hazardous waste laws. Some of these facilities are among the largest in the country - examples include Hanford's single and double shell tank farms, hazardous waste landfills, and the planned Grout and Vitrification plants.

* Fourteen hundred historical hazardous waste disposal sites have been identified on this site. These sites must be addressed under CERCLA or state hazardous waste cleanup laws.

SUMMARY OF THE STATE'S ATTEMPTS TO REGULATE THE HANFORD FACILITY

Again, to give the committee some perspective on this issue, I will briefly outline the State's attempts to regulate the Hanford facility.

* 1942-1983: The Atomic Energy Commission, and later DOE, operated the Hanford facility with no regulation or supervision from the State or EPA. In effect, the facility was self-regulated.

* 1976-1984: DOE took the position that RCRA and state hazardous waste laws did not apply at all to DOE facilities.

* 1984: DOE refused to allow state regulators on the Hanford site. Only after a Notice of Intent to Sue was filed did Energy allow access.

* 1984: The case entitled LEAF v. DOE was decided. In this case, the Federal District Court for Tennessee ruled that RCRA does indeed apply to DOE facilities.

* 1984-1987: Following the LEAF decision, DOE immediately took the position that RCRA and state hazardous waste laws applied only to hazardous waste which contained no "by-product" material. Thus, under this concept virtually all of DOE "mixed waste" would have been exempted from RCRA. At Hanford, this would would have left the State, and EPA, with little to no regulatory role.

* 1987: DOE finally recognized that RCRA applies to mixed waste. The Congress and many members of this committee were instrumental in forcing Energy to recognize RCRA jurisdiction over mixed waste.

* February 1986: The State Department of Ecology issued a $49,000 civil penalty and administrative order against DOE for

numerous failures to comply with RCRA groundwater monitoring requirements, illegal disposal of hazardous wastes and other violations at the Hanford facility. DOE brought a lawsuit in federal district court against the State to challenge the State's authority to issue the penalty. In October of 1987, the Federal District Court for the Eastern District of Washington agreed with DOE's and the Department of Justice's argument that there has been an insufficient waiver of sovereign immunity in RCRA to allow the State to issue civil penalties against federal facilities. The Ninth Circuit Court of Appeals has now affirmed the District Court's decision. United States v. State of Washington, 872 F.2d 874 (9th Cir. 1989).

This overview of the Hanford site and the State's largely unsuccessful attempts to regulate the facility brings us to 1988. Unfortunately, after DOE's recognition of RCRA's applicability to mixed waste, DOE's focus simply shifted from applicability to enforceability.

SOVEREIGN IMMUNITY

DOE's most consistent and most successful defense in state enforcement efforts throughout the country has been sovereign immunity. Furthermore, DOE is not alone in raising the sovereign immunity shield against state enforcement efforts. Department of Defense facilities and other federal agencies have also been quick to raise sovereign immunity whenever a state or citizens attempt to enforce environmental statutes against them. It appears that at every opportunity, no matter how clear and deliberate the attempt by Congress to waive immunity in environmental matters, the U.S. asserts that the waiver is ambiguous, and therefore, state enforcement efforts must fail.

As I stated in my summary of remarks, it is the State of Washington's view that federal agencies must comply with federal and state environmental laws to the same extent and in the same manner as any other person, private business, or state or municipal government. This Congress has echoed that position in the sovereign immunity waivers in the Clean Water Act, the Clean Air Act, CERCLA, RCRA and a number of other federal environmental statutes. Despite this clear message from Congress, the federal agencies affected, and their legal representative the Department of Justice (DOJ), have repeatedly raised sovereign immunity to defeat enforcement actions throughout the country.

DOJ has taken the position that the waiver of sovereign immunity in RCRA is not broad enough to allow the imposition of civil penalties, the issuance of administrative orders, or the imposition of criminal sanctions. Thus, according to DOJ, virtually all non-litigation enforcement options are simply not available against federal agencies.

Further, DOJ has argued that only those standards which are "objective and ascertainable" are enforceable. In other words, any standard or requirement which involves the exercise of judgment or discretion by EPA or the states is unenforceable. Thus, according to DOJ's theory, the only viable enforcement option available to states is litigation to enforce only the most objective and ascertainable standards contained in RCRA.

While federal agencies often voice a commitment to protecting the environment, and will wholeheartedly agree that they are subject to federal environmental laws, these same federal agencies will resist any effort to enforce those statutes and will force the states into expensive and time-consuming litigation if such enforcement is to ever occur. It is because of this that S. 1140 is so important. Civil penalties and administrative orders are by far the most common enforcement tools used by state environmental agencies. These remedies are relatively straightforward and easy to administer. Both of these enforcement tools are very effective deterrents against environmental noncompliance. In the State of Washington, the use of civil penalties and administrative orders is commonplace, while environmental litigation is quite uncommon. Howevar, as mentioned above, civil penalties and administrative orders have not been successful against federal agencies.

Apparently, it is the position of the federal government that if states are given the ability to impose civil penalties against federal agencies, such penalties will be used to raid the federal treasury, and will effectively reduce the monies available for environmental compliance and restoration at federal facilities. This argument is simply wrong. The monetary amount of civil penalties is generally low and is limited by statute to specific amounts. Such penalties usually do not exceed $50,000, and most commonly are in the $5,000 to $20,000 range. Moreover, federal agencies, like any other person, can seek administrative and judicial review of any penalty.

It is difficult to imagine these monetary amounts will result in a "raid" of the federal treasury. In truth, the amount of the penalty is almost irrelevant. The Air Force fought a $10,000 penalty imposed by the State of Washington just as strongly as the Department of Energy fought the $49,000 penalty imposed against it. It is the very fact of the penalty, and the associated publicity, that make the penalty an effective deterrent to environmental noncompliance.

I might also note that the federal government is rarely hesitant to issue civil penalties against state and local governments. In fact, several municipalities in the State of Washington have been penalized by EPA for noncompliance with several federal environmental statutes. It's curious that the federal government believes it entirely appropriate to penalize state and local governments but that penalties flowing in the other direction are completely unacceptable.

THE HANFORD AGREEMENT

As a final major point, I would like to bring to the committee's attention the Hanford Federal Facility Agreement and Consent Order, signed on May 15, 1989 by the State of Washington, USDOE, and EPA. This comprehensive agreement requires that DOE clean up the Hanford facility and bring it into full compliance with RCRA and state hazardous waste laws. We think that this agreement, which will bring the largest and most contaminated federal site in the United States into full compliance with all environmental laws and will result in the cleanup of 40 years' worth of contamination, is one of the best in the country. However, it is not worth the paper it is written on unless it is enforceable.

We have concurrence from DOE and DOJ that the agreement is indeed enforceable. However, in the absence of S. 1140, the spectre of sovereign immunity looms large in any enforcement action brought under the agreement. It is absolutely essential to the continued viability of the Hanford agreement that S. 1140 pass as it is now written and that it pass quickly. If EPA or DOE argue that Washington State's signing of the Hanford agreement is a signal that S. 1140 is unnecessary, they are incorrect and are misrepresenting the State of Washington's views. To the contrary, passage of S. 1140 has become doubly important to the State of Washington in light of the Hanford agreement.

CONCLUSION

It has been my pleasure to testify before this committee today. S. 1140 is essential to the State of Washington and to the citizens of the United States. I wish to make my staff available to the committee's staff to provide any necessary assistance or input. It is only through clear state and citizen enforcement authority that federal facilities will ever come into compliance with RCRA and state hazardous waste laws. I, on behalf of the State of Washington, urge that this committee and that the Congress pass S. 1140 swiftly and without amendment.

THE STATE OF WYOMING

90 MA

Attorney General

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CRIME VICTIMS COMPENSATION 777-5984

May 1, 1990

Senator Quentin N. Burdick, Chairman
Environment and Public Works Committee
458 Dirksen Senate Office Building
Washington, DC 20510

Re: S1140

Dear Chairman Burdick:

I am writing to register my support for S1140 in order to motivate federal compliance with the same waste management standards to which state, local and private operations are held. A double standard of accountability is inappropriate because the adverse environmental impacts that such regulations seek to avoid are no less serious when caused by non-compliance at federal facilities.

Sincerely,

Joseph B. Meyer

Joseph B. Meyer
Attorney General

JBM:jt
xc: Senator Wallop
Senator Simpson

1890-1990
WYOMING
CENTENNIAL
A LASTING LEGACY.

Senator **Burdick**. Senator Warner.

OPENING STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Senator **Warner**. Thank you, Mr. Chairman.

Mr. Chairman, I feel I have to respectfully disagree with my distinguished friend, the majority leader if in fact he wished to indicate that the testimony that will be forthcoming today by the various Government departments and agencies will be at variance with the positions taken very clearly by the President of the United States.

In my consultations with the representatives of those departments and agencies in preparation for this hearing, it is my judgment that the President has directed and that they are now following a change of attitude which will reflect a willingness—an absolute willingness—to proceed to clean up those areas that the Federal Government, past and present, participated in in fouling our environment.

Speaking for myself, I wholly support the concept that we should require the Federal Government in every respect to comply with State and local law on the environment. The question today is should we in some manner amend S. 1140 based on the testimony and other information that this committee to provide that in an orderly manner?

I say orderly because, Mr. Chairman, the distinguished leader, pointed out a court decision, but there is a difference of views in the third branch of the Government, the Federal Judiciary, and if there is an ambiguity in the present law, then Congress is at fault. We wrote the law. It's as simple as that.

Therefore, we share in this blame. We cannot simply point our finger at the Executive Branch, this President, or his predecessors in office and say the blame entirely rests with the Executive Branch. I think we will unquestionably clarify that ambiguity but at the same time enable the Federal Government to comply in an orderly fashion.

There's a second function that Congress plays in this equation, and it's just as important as the clarification of the law, and that is the appropriations. No matter how well intentioned, the President, respected departments and agencies of the Federal Government, if the Congress does not appropriate adequate funds to meet the requirements to clean up, the program will fail.

There's another area that concerns this Senator, and I'll focus on that as we begin our work in this bill, and that is the public servants, the Government employees at all levels, who will be responsible or have in the past been responsible for the actions of the departments and agencies for which they're part of and employed by. To what extent can we make them subject to criminal penalties when they, in good faith, have been following the directions from the President on down? It's a careful subject that has to be addressed.

So, Mr. Chairman, I look forward to working with members of this committee and in the Senate as a whole. I am confident that we will provide an unambiguous direction, not only to the President and his subordinates but to the courts, of the will of Congress in requiring the Federal Government to fully comply with all environmental laws and regulations.

I'm hopeful that in the future this Congress and others will appropriate adequate funds and that we'll put in there safeguards for those Federal employees that are involved.

Mr. Chairman, I ask that unanimous consent be given that, following my statement, be placed in the record communications to the Congress through me by the Governor of Virginia and the Attorney General of Virginia that both of these distinguished Americans fully support the major thrust of S. 1140.

Senator BURDICK. They're received without objection.

[Senator Warner's statement and the letters referred to follow:]

OPENING STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Mr. Chairman, today we will be hearing testimony on S. 1140, the "Federal Facility Compliance Act." This is an important issue worthy of this Committee's careful attention.

Mr. Chairman, let me state at the outset that I strongly support requiring the federal government to comply with all environmental laws and regulations. However, S. 1140 goes will beyond this principle by amending existing law to subject the federal government to fines and penalties for violations of the hazardous waste laws.

Mr. Chairman, it is my understanding that the witnesses testifying on behalf of the affected federal agencies will tell us that they are willing to accept fines and penalties for day-to-day compliance failures. However, these same agencies will also tell us that they are concerned about S. 1140's requirement that fines and penalties be levied on them for corrective action, or clean-up.

Mr. Chairman, I share their concern. First, in my view, S. 1140 will interfere with the federal government's ability to set its priorities properly and clean up the worst sites first. In addition, S. 1140 fails to consider the fact that the federal government would be unable to finance clean-up efforts adequately while being subjected to unlimited amount of fines and penalties imposed by the states.

I am fully aware of, and sympathetic to, the concerns of the states with regard to this legislation. They want hazardous waste sites within their borders cleaned up as soon as possible.

I remind my colleagues that no one is more familiar with the issues raised by the presence of federal facilities than I am. The Commonwealth of Virginia serves as a host for the facilities of many federal agencies, including the Department of Defense. I have always shared Virginia's desire to see that these facilities act as good neighbors and responsible citizens.

There is a difference between working towards this goal by making the states an equal participant in the process and allowing them to drive the process. Under S. 1140 as currently drafted, the federal government could well be pulled in, if not fifty, many different directions to attempt to respond to state concerns. Such an atmosphere makes it impossible to allocate resources in a manner that will eliminate the most serious threats to human health.

In addition, S. 1140 will make significant new demands on the federal treasury. In these days of severe budget constraints, it is important that the Congress is fully aware of the exact nature of the budget commitments we are making here. If the members of this Committee are willing to accept the possibility of a "raid" on the federal treasury, that is their choice. I believe that we need to be sure that the clean-up process goes forward in a more rational manner.

Mr. Chairman, I look forward to hearing from all of the witnesses today. It is my hope that they will present us with some constructive ideas to discuss further before we mark up this legislation.

Mr. Chairman, in closing, it is my hope that this Committee will give thoughtful consideration to S. 1140 and to all possible amendments that may result from discussions at this hearing today. It is not useful to rush this process. Surely the Committee members and other concerned parties can find some common ground. I will be looking for that common ground as I listen to the testimony today.

Thank you, Mr. Chairman.

COMMONWEALTH of VIRGINIA

Office of the Governor
Richmond 23219

Lawrence Douglas Wilder
Governor

May 1, 1990

The Honorable John W. Warner
Member, United States Senate
225 Russell Senate Office Building
United States Senate
Washington, D. C. 20510

Dear Senator ~~Warner:~~ John

I would like to express my support for S. 1140, sponsored by Senator Mitchell.

As you are well aware, the Commonwealth is privileged to serve as host for the facilities of many federal agencies, including the Department of Defense. During the last few years, state inspections have revealed that a number of these DOD facilities have been in substantial noncompliance with Virginia's regulations governing hazardous waste management, air quality, and water quality. Because these facilities have voluntarily entered administrative enforcement orders, and because military bases in Virginia have given greater attention to environmental compliance, I am pleased to report that a large number of the violations have been resolved. The leadership of the Administrator of the U. S. Environmental Protection Agency and the Secretary of Defense and the secretaries of the service branches has focused the attention of the bases on their environmental obligations.

Despite efforts of DOD facilities, Virginia's experience suggests that S. 1140 offers a much needed enforcement mechanism. The inability of the states to use stronger enforcement tools has hampered efforts to bring federal facilities into compliance and once brought into compliance, to maintain base command interest in continuing proper management. The possible imposition of civil penalties presents a strong deterrent and demonstrates the importance of compliance.

Activities undertaken at military facilities present potential hazards to Virginia's citizens and present threats to our natural resources. Not only should federal facilities have to comply with the same requirements imposed on private businesses and on local and state agencies, but they should also be subject to strict enforcement options if they fail to comply. Pollution of air, the water or the land is the same whether it originates at a federal facility or if it comes from a farm, a private factory or a local wastewater treatment plant.

S. 1140 also identifies the importance of assuring effective coordination of federal environmental management. The bill clarifies the power of the United States Environmental Protection Agency, as well as that of the states, to enforce hazardous waste management regulations at federal facilities.

Your favorable consideration of Senator Mitchell's bill would be appreciated.

With best wishes, I am

Very truly yours,

Lawrence Douglas Wilder

LDW/tas
Enclosure

cc: The Honorable Mary Sue Terry
The Honorable Elizabeth H. Haskell
Virginia Liaison Office

COMMONWEALTH of VIRGINIA
Office of the Attorney General

Mary Sue Terry
Attorney General

H. Lane Kneedler
Chief Deputy Attorney General

R. Claire Guthrie
Deputy Attorney General
Human & Natural Resources Division

Gail Starling Marshall
Deputy Attorney General
Judicial Affairs Division

Walter A. McFarlane
Deputy Attorney General
Finance & Transportation Division

Stephen D. Rosenthal
Deputy Attorney General
Criminal Law Enforcement Division

Deborah Love-Bryant
Executive Assistant

February 22, 1990

The Honorable John W. Warner
The United States Senate
225 Senate Russell Office Building
Washington, D. C. 20510-4601

Dear John:

I write to express my support for, and to ask you to co-sponsor legislation, S. 1140, which would clarify the waiver of federal sovereign immunity under the Resource Conservation and Recovery Act. S. 1140 is pending in the Senate Environmental Protection Subcommittee. I know that you and members of the Subcommittee have focused your attention on the Clean Air Act Amendments; nonetheless, I hope that the Subcommittee will hold hearings and move S. 1140 ahead at the earliest opportunity.

Virginia has been authorized under RCRA § 3000 to administer and enforce its hazardous waste program since 1981. There are many federal facilities in Virginia; in fact, since 1981, Virginia has taken enforcement action against approximately 10 facilities. The focus of our enforcement program has been on administrative civil penalties, which are essential to an effective enforcement program. Civil penalties encourage compliance. I can think of no sound public policy which would require the exemption of federal facilities from assessments for violations of state law regulations.

S. 1140 would give Virginia and other states an important enforcement tool to use in their programs designed to protect human health and the environment. This issue is of great concern to me as well as my colleagues around the country. Enclosed is another copy of the letter sent to Representative Luken in support of the similar House bill, H.R. 1056, which the House passed last July.

Your help in securing passage of this bill as soon as possible would be appreciated. Please feel free to call me or Deputy Attorney General R. Claire Guthrie, if we can provide you with any additional background.

Supreme Court Building · 101 North Eighth Street · Richmond, Virginia 23219 · 804-786-2071

With best personal regards, I am

Very truly yours,

Mary Sue Terry
Attorney General

01/249-HNE
Enclosure

cc: The Honorable L. Douglas Wilder, Governor

The Honorable Elizabeth H. Haskell
Secretary of Natural Resources

Deputy Attorney General R. Claire Guthrie

Cynthia V. Bailey, Director
Department of Waste Management

Senator BURDICK. Senator Jeffords.

Senator JEFFORDS. No opening statement, Mr. Chairman.

Senator BURDICK. Senators Reid and Chafee have statements that will be made part of the record, and also a statement from our colleague Brock Adams, without objection.

[The statements referred to follow:]

OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Mr. Chairman, I should like to take this opportunity to express my support for S.1140, the Federal Facility Compliance Act of 1989.

Each year Federal facilities generate huge quantities of hazardous waste. Such waste contains radioactive materials, heavy metals, acids, and nitrates. All of which can cause major environmental problems if not managed properly. And all too often, I'm afraid, the waste is not managed properly.

The Federal government has been notably slow to comply with federal and state environmental laws. Regulations are frequently ignored, and mismanagement of hazardous waste regularly covered up. Just recently, the Fallon Naval Air Station in Nevada allegedly covered up a 20,000 gallon fuel spill.

I have long been concerned about the failure of those Federal facilities that are located in Nevada to comply with Federal and State environmental laws. In particular, the Department of Energy has been slow to meet environmental regulations at the Nevada Test Site. It was to address such concerns that I co-sponsored the Federal Nuclear Facilities Environmental Response Act of 1989.

In my view, the Federal Facility Compliance Act of 1989 perfectly complements the aforementioned Bill. Both are designed to ensure that federal facilities meet Federal and State environmental laws. It is unfortunate that we cannot rely upon the Federal government to put its own house in order. But past experience suggests that we should not count upon the goodwill of the Departments of Energy and Defense in this matter.

Mr. Chairman, this hearing will address some very important issues. Concern for the environment must not stop at the gates of Federal Facilities. Rather, the Federal Government should be setting an example that others will follow.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Mr. Chairman, I want to thank you for convening this hearing today to address one of the more vexing problems of environmental contamination that currently faces our country—the problem of cleaning up our nation's numerous Federal facilities. The specific bill that we will examine today—S.1140— is an effort to address one aspect of this problem, and I am hopeful that we will be able here to develop a record that sets the stage for some real progress.

We have a full agenda this morning. We are delighted that the States, the environmental community, and representatives from several of the more affected Federal agencies have been able to attend this hearing to share their views with us. And I note particularly that my friend from California, Senator Wilson, is waiting to testify, so I promise not to keep him waiting. But I do want to offer a few preliminary observations about S. 1140 and about the Federal facility cleanup issue.

First, it is obvious that this issue is a very significant one that has sparked more than the usual debate associated with environmental issues. There is a perception that Federal facilities have not been as quick to respond to their environmental problems as they ought to have been. A number of lawsuits have been brought in a variety of jurisdictions to force these facilities to come to grips with these problems, and the courts have reached results that are in conflict on certain aspects of the law.

At the same time, estimates of the costs associated with these cleanups are exceedingly high. The Department of Defense has estimated its costs to clean up its facilities under the Superfund statute at roughly $15 billion dollars. And the Department of Energy has estimated its environmental cleanup and compliance costs to exceed $100 billion dollars. These numbers, I must say, are arresting, and they suggest that we need to be taking a careful look at the best method to proceed.

S. 1140 offers one approach to this problem. It would allow States and localities to impose civil and administrative fines and penalties on Federal facilities for violations of the Resource Conservation and Recovery Act and other laws concerning the management of hazardous and solid waste. States and localities already have the authority to seek injunctive relief to force cleanups, and S. 1140 would add penalties to the State and local arsenal.

Mr. Chairman, I think that all of us can agree that Federal facilities must comply with RCRA requirements. And I further believe that there is no dispute that compliance should be prompt and complete. The difficulty, of course, is whether we will ever be able to find sufficient money to fund clean ups and compliance at these facilities with the speed demanded by those affected in the States and local communities.

So, Mr. Chairman, I am supportive of the concept embodied in S. 1140, but I am concerned by the following potential scenario that in my view would be possible if the bill were to be enacted in its current form: as I read it, the bill would allow the States and localities to impose penalties of up to $25,000 per day whenever the particular Federal facility is unable—for whatever reason, perhaps for lack of federal funding—to proceed as quickly as the State would like with cleanup.

Penalties imposed at this rate can add up rapidly to enormous sums. A facility that missed a cleanup deadline by one month could face a fine of $750,000. It is not hard to imagine that any State, or locality, that took an aggressive position to force a cleanup by means of imposing these kinds of penalties, could require the Federal agency to clean up the site that is of local interest, without regard to whether that particular site is the worst site in the nation, or even in that State.

So I am concerned that S. 1140 has the potential to disrupt federal priorities that should channel money toward the most contaminated Federal facilities first, and would leave other, less contaminated site cleanups until money was available.

I want to be clear about this. I do not mean to suggest that the Federal government should be relieved of the responsibility to clean up its facilities as vigorously as possible. To the contrary, I would like to see language in this bill that required the federal government to begin working immediately with the States to establish a strict priority system and pursue cleanups at the worst sites as soon as they are identified.

So I am looking forward to the testimony today from all affected parties, and I am very hopeful that we can begin to proceed expeditiously to arrive at the solution to our Federal facility problems.

Mr. Chairman, I will have questions for the witnesses at the appropriate time as the hearing progresses.

STATEMENT OF HON. BROCK ADAMS, U.S. SENATOR FROM THE STATE OF WASHINGTON

Mr. Chairman, I appreciate being given this opportunity to submit testimony to the Committee on Environment and Public Works today on a bill that I strongly support: S. 1140, the Federal Facility Compliance Act of 1989.

As this Committee is well aware, there are three basic sections of this bill. In one section, the bill would require that all federal facilities assess their hazardous substance releases and those releases' compliance with a variety of environmental laws. Each such assessment would be forwarded to the Environmental Protection Agency (EPA) and to the relevant state. In the second section, the bill would require that the EPA annually inspect federal facilities for environmental compliance, and would make the inspection records available to the public. The third section, however is the fulcrum of this bill and is of great importance to the State of Washington and to me.

This section of S. 1140 clarifies that federal facilities must comply with the Solid Waste Disposal Act or face enforcement sanctions as private industry and state facilities do. The bill clarifies this by explicitly waiving the federal government's "sovereign immunity" from requirements of the Solid Waste Disposal Act, otherwise known as RCRA. While it has been suggested that the authors of RCRA intended the law to waive sovereign immunity, the Federal Facility Compliance Act is necessary because federal courts are divided as to whether or not sovereign immunity has actually been waived.

In fact, the State of Washington has been caught in just this tangle. In 1986, the State assessed penalties under RCRA against the Hanford site—a large, Department of Energy, nuclear weapons installation in Washington. $49,000 in penalties were assessed for a number of violations ranging from serious to critical in nature, including the disposal of hazardous materials into illegal, leaking facilities. Unfortunately, when the case was tried, both the trial court and the court of appeals ruled against the State because it was not clear that the federal government had waived sovereign immunity under RCRA. In other instances, courts have ruled in favor of the state and against the federal facility. Thus, this issue has been pushed right back to Congress' doorstep.

Explicitly waiving sovereign immunity would allow states to use the enforcement mechanisms in the Solid Waste Disposal Act designed to ensure facilities' compliance with this law. These mechanisms include state-imposed administrative orders, fees and penalties. These are the most common means by which states enforce environmental requirements. While some who oppose this bill suggest that the allowance for fees and penalties invites abuse on the part of states, the data suggest that fines and penalties are modest and are used as a last resource.

Taking this back to Washington State, the passage of this bill is especially important because of the number of federal facilities in the state and because of those facilities' continuing failure to comply with state and federal hazardous waste laws. In particular, at Hanford the State has entered into an agreement with the Department of Energy and the Environmental Protection Agency to bring the facility into compliance with state hazardous waste laws and to clean up the facility under CERCLA. Because this agreement was not set forth under consent decree, the passage of this bill is essential to the enforceability of that agreement. I am sure that you will hear more on the situation in Washington State from Ms. Christine Gregoire, who is Washington's Director of Ecology and will be testifying before your committee on this bill.

Finally, S. 1140 contains a provision that would revive the Environmental Protection Agency's administrative order authority regarding violations at federal facilities. This provision is necessary because the Administration has recently argued that the executive branch must be unified, and that no agency may issue unilateral orders toward another agency. I am supportive of this provision.

In short, I am strongly supportive of the Federal Facility Compliance Act as it now stands. I urge the Committee on Environment and Public Works to pass this bill without weakening amendments, and I will be fighting for the same on the Senate floor.

I thank you again for allowing me to submit this testimony today.

Senator Burdick. We will now call the first panel. The Honorable James E. Tierney, Attorney General of Maine; and Mr. Jack Van Kley, Assistant Attorney General, on behalf of Anthony J. Celebrezze, Attorney General of Ohio. Representing the Governors' Association will be Christine Gregoire, Director of the Department of Ecology, State of Washington; and Tom Looby, Assistant Director for Health and Environment Programs, Colorado Department of Health.

Welcome to the committee, and you may proceed as you wish.

STATEMENT OF HON. JAMES E. TIERNEY, ATTORNEY GENERAL, STATE OF MAINE

Mr. Tierney. Thank you, Mr. Chairman.

My name is Jim Tierney, I'm the Attorney General of the State of Maine, and I appear before you this morning on behalf of all 50 of the Attorneys General of this Nation who support S. 1140 as a means to clarify the rights of the State to assess fines and penalties against Federal facilities that are violating our hazardous waste laws.

While submitting my formal remarks for the record, if I could attempt to place this testimony, and perhaps the rest of the day, in a context by discussing what is not at issue here today. What is not at issue is that hazardous waste is extremely dangerous to the human health and the future of this country. What is not at issue is that this Congress has passed civil and criminal penalties as a means to regulate hazardous waste and to punish those who would violate our laws.

What is not at issue is that this Congress has never exempted anyone from the responsibility of obeying these laws, whether it be a private company, a community, a county, a university, or the Federal Government: No one is exempt. What also is not at issue, in my personal opinion, is the years of frustration and pain and work that hazardous waste clean up bring to those of us who believe in a clean environment.

I believe that our laws are beginning to have an effect. We are cleaning up hazardous waste sites around this country. We are a safer country today because of these efforts. So what's the discussion all about?

It appears that one source of hazardous waste in this country, and one source only, is defying prosecution when they violate the law, and that source is our own Federal Government. The Environmental Protection Agency, the Federal agency responsible for environmental protection, has been prohibited by the Department of Justice from bringing a lawsuit against a Federal facility, no matter how egregious the environmental harm, no matter how badly the hazardous waste is being handled.

The question before this committee, long the environmental conscience of the Congress, is who is going to force this cleanup and how is it going to be done? I believe strongly that the original intent of the Congress and the legal ruling which we've received in house indicate that it is the States which have this responsibility and have used it responsibly, because we have two choices.

One choice is to fail to act, and allow the status quo to continue. If we do, I do not feel that there is a Federal facility that will make the necessary corrective actions. I do not believe there is enough money in the budgets and I do not believe that there is even enough information in the possession of the Federal Government to establish the so-called priority list. They don't have this information because Federal facilities do not voluntarily come forward and present their superiors in the Pentagon and the DOE with just how serious the problems are.

So I feel that the lack of this serious effort can only be remedied if all of us in all of the 50 States continue with our traditional prosecutorial responsibilities so that we can allow fines and penalties to do their will and put the pressure on the polluters. We must force our own Government to obey the same laws we all have to obey.

In Maine, we have a dramatic example of just how this works. We have two shipyards. Both employ thousands of people. Both engage in 100 percent Federal work. One is Bath Iron Works, a private shipyard, that's long been subject to our State regulations and Federal regulations. They have complied with our laws. They've occasionally had to pay small penalties. They've shown environmental integrity.

The other yard is a Federal Naval shipyard, the Portsmouth Naval Shipyard, in the southern part of our State, very close to Walker's Point, where President Bush spends his summers. At that facility, we have the opposite history. We see very little progress, if any, on corrective action. We see very little progress on compliance.

Four years ago, my office was forced to bring a lawsuit against that Federal facility, our own Federal Government, in order to make some progress. Only after the suit was filed did they begin at the top levels to take their environmental problem seriously and begin to make some movement.

These message I am delivering is a message from the States, all of the States. It is what you'll hear from the other members of this panel. It is what you'll hear from the environmental groups. In conclusion, just let me say one thing. We're all Americans who want the same thing. We've all sworn to uphold the same laws in Constitution. We all want a strong defense, a balanced budget, safe energy, and a clean environment.

Those of us in the States are not an alien force. We have not abused our power under the Clean Air Act, the Clean Water Act, and the Safe Drinking Act. Please have faith in our commitment to this common principle, and I can assure that America will be a better place.

Senator **Burdick**. Thank you.

Mr. Van Kley?

STATEMENT OF JACK VAN KLEY, ASSISTANT ATTORNEY GENERAL, REPRESENTING ANTHONY J. CELEBREZZE, JR., ATTORNEY GENERAL, STATE OF OHIO, AND THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. **Van Kley**. Thank you, Mr. Chairman, members of the committee.

My name is Jack Van Kley, I'm Chief Litigator of the Environmental Enforcement Section of the Ohio Attorney General's Office. I'm here today representing Anthony J. Celebrezze, Jr., Attorney General of Ohio, and the National Association of Attorneys General.

I thank the committee very much for this opportunity to testify. I have a longer written statement which, along with my verbal statement, I would request be made part of the record.

Senator **Burdick**. It will be received.

Mr. **Van Kley**. Thank you.

I'd like to start the substantive part of my testimony by quoting from a letter that was submitted to Congress in 1976 during the consideration of RCRA. One sentence from this letter states, "the Department of Justice favors the inclusion of both civil and criminal sanctions for the most effective enforcement of environmental laws."

This wasn't a State official speaking, this was a Federal official, a Federal official involved with responsibility for enforcing the Federal laws against polluters. As part of the consideration of RCRA at that time, the Department of Justice very heavily favored the inclusion of sanctions as the only way to enforce compliance with the law.

I would mention also that sanctions such as criminal penalties and civil penalties are routinely enforced against private individuals to make sure that they do comply with the law. In addition to that, they are also enforced very strictly against municipalities and States who happen to violate the law.

In fact, in Ohio, it's been our concern that the enforcement policy against municipalities is so strict on behalf of the Federal

Government that some of our cities have to divert money from fire and police protection in order to pay civil penalties.

There's a good reason for imposing civil penalties, even in that situation, and the reason is that if you don't enforce the hazardous waste laws by authorizing penalties against those who do not comply, people are going to get hurt, and that's the very important purpose of this bill.

I saw some statistics yesterday that recounts that class one violations have been found, and these are class one violations, those that have the potential to result in a release of hazardous waste into the environment. At private facilities, 62 percent of the facilities had no class one violations.

With respect to Federal facilities, only 38 percent of the Federal facilities had no class one violations. Why is there a big difference in compliance between the private and the Federal sector? Well, the reason is in the history of the enforcement under RCRA.

It's been 14 years now since RCRA was enacted, and at the time it was enacted, Congress felt that penalties were available not only against the private sector but the Federal sector as well. My written testimony explains that in more detail. However, the Federal Government has undertaken a campaign at defeating those civil penalties and other sanctions against the Federal Government, and as a result, the people who are operating these Federal plants don't believe they can be penalized if they violate the law, so they're content to stand around and do nothing under the RCRA laws; at least, in the past they have, and right now they've improved, but their improvement is not that great.

They are content to sit around until someone sues them and tries to get an injunction against them. I believe there are a couple of examples in Ohio that illustrate this point very well. The first facility I'd like to talk about is called the Portsmouth Uranium Enrichment Plant near Piketon, Ohio.

At this plant, the Department of Energy dumped hazardous waste into five lagoons, two fields, and a landfill. To show you how sophisticated their treatment of hazardous waste was, they took solvents in oil, and they rototilled it into a field as their method of disposal. They had an incinerator called the "Radicator" which they used to burn mercury, a compound lethal to humans.

Ground water monitoring, once they got around to it years after they were supposed to, showed that the water was very badly polluted. In fact, one sample showed 100 percent trichloroethylene. This facility, once we filed the complaint, had a grand total of 32,361 days of violation.

You can imagine what the cleanup is like at that facility. One person from Ohio EPA remarked to me the other day that he was going to go down to the landfill at the Portsmouth plant and watch them dig sludge out of a lagoon so that they could properly handle it. So the major point that I want to make is that if a person has no incentive to comply with the law because he doesn't believe he can be punished for doing it, he is going to proceed to violate the law, and that is going to result not only in health impacts to our citizens, but it's going to result in very expensive cleanups as well.

The bill you have before you today is very important not only to protect the public health, but also to prevent this very important drain on our Treasury. I thank the committee very much for listening to me, and after the statements are over, I'll be happy to answer any questions you might have.

Senator **Burdick**. Ms. Gregoire.

STATEMENT OF CHRISTINE GREGOIRE, DIRECTOR, DEPARTMENT OF ECOLOGY, STATE OF WASHINGTON

Ms. **Gregoire**. Good morning, Mr. Chairman, members of the committee.

My name is Christine Gregoire, I'm the Director of the Washington State Department of Ecology, and I appear before you today on behalf of the State of Washington, Governor Booth Gardner, and the National Governors 'Association. I've been involved in Federal compliance issues as a regulator, as Director of the Department of Ecology, and also as a Deputy Attorney General with the Washington State Attorney General's Office prior to that.

By way of introduction, let me say that there are two key issues that I think have brought us here today. First, we are in a process now of negotiating with DOD and DOE specifically with regard to compliance cleanup agreements, which delineate waste management and cleanup actions. These agreements set forth the respective roles of the States, EPA, and the respective facilities.

Secondly, Secretary Watkins, on behalf of DOE, has begun initiatives since his confirmation that have demonstrated that he recognizes the magnitude of the cleanup problems in his agency and that he intends to work with the States in an effort to deal with those surmountable problems. The Secretary has recognized these and has begun an effort to set priorities around the country in working with the key States.

Some progress has been made with DOD facilities. Both Secretary Watkins and some of the DOD facilities, as well as these initial agreements between the Federal Government and the States, have allowed us to finally begin the process of regaining public confidence that their environment and health will be protected by the Federal Government at Federal facilities.

Unfortunately, USDOE and USDOD have failed to recognize when it comes to enforcement actions—they have stopped short there—that enforceability is a critical element of an efficient cleanup. I ask you to ask them why have they stopped short. Each has been quick to claim immunity whenever the States have attempted to enforce their environmental laws regardless of the merit of the violation. I would encourage you to ask why.

These actions to avoid compliance and cleanup both prolong the task at hand and increase the overall cost and the impact on both the environment and the human health. In the instance of the Resource Conservation Recovery Act, Federal agencies have ignored the direction of Congress in section 6001 and have successfully avoided, particularly in our State, enforcement actions by claiming that the language within the Act is unclear, though Congress' intent, in our opinion, is clear. What kind of message does that send to our citizens?

DOJ has taken the position that the waiver of sovereign immunity is not broad enough to allow for the imposition of civil penalties and administrative orders. Thus, according to DOJ, enforcement options other than full blown litigation are simply not available, and full blown litigation does not clean up the facilities.

These instances by the United States should be recognized as things of the past and should be put behind us, and we should move forward with environmental compliance and waste management. These efforts are counterproductive to Secretary Watkins' initiatives and to the States' attempts to clean up the environment in a partnership with the Federal Government. These further erode public confidence in both DOD and DOE.

Governor Gardner and I wholeheartedly endorse the recent recommendations from the National Governors' Association and the National Association of Attorneys General in which they have recommended, first, Congress should clearly waive Federal sovereign immunity from the application and enforcement of Federal and State environmental laws, and, secondly, Congress should enact legislation to improve USEPA's ability to regulate other Federal agencies.

At this point in time, no one has the ability to regulate a Federal facility in terms of compliance with waste management. This bill would implement each of those recommendations. I'd also like to point out that this past year 10 States have come before this Congress encouraging this bill and Federal compliance. Those include key States of Colorado, Idaho, Kentucky, Nevada, New Mexico, Ohio, Oregon, South Carolina, Tennessee, and Washington. Their comments have been submitted to you, Mr. Chairman, and to Senator Johnston of the Committee on Energy and Natural Resources and to the Secretary.

The fact that Federal facilities are far behind the private sector in initiating environmental compliance in cleanup is beyond dispute. So is the fact that many of our largest and most complex waste management challenges lie within the Federal sector. The public would not accept those kinds of actions by either a local government, a State government, or a private facility.

Our citizens will not accept violations of Federal environmental laws by Federal facilities. In Washington, at the DOE Hanford site, we face staggering quantities of radioactive mixed wastes where there have been improperly stored and troublesome facilities. We have engaged in a process of developing an agreement in a partnership way. If other facilities can engage in those kinds of agreements, we can move forward to a cleanup process.

The only problem is whether those agreements are enforceable, and this bill would solve that issue. To be effective, the Federal agreements must be backed up with the same enforcement sanctions as agreements with the private sector. What can justify a double standard? It is important that the dispute resolution process and the ability for the Federal agencies to appeal is taken into account here. They have the same rights as any other State or any other private facility.

Let me just say in closing that if DOE and DOD mean what they say, that they want to come into compliance, why would they in any way water down this bill? We need to stop the double standards for the Federal agencies between them and the rest of the country. We in Washington State and the other States like to see

Government as the example, not what we find in the Federal facilities.

We need to have the Federal facilities be a model. We need to get on with cleanup, and most importantly we need to get public confidence back that the Federal Government itself will comply with Federal environmental laws.

I thank you, Mr. Chairman, and I'd like to submit my testimony for the record.

Senator **Burdick**. Thank you, and your testimony will be received.

Mr. Looby?

STATEMENT OF TOM LOOBY, ASSISTANT DIRECTOR FOR HEALTH AND ENVIRONMENT PROGRAMS, COLORADO DEPARTMENT OF HEALTH

Mr. **Looby**. Mr. Chairman, member of the committee, thank you.

My name is Tom Looby, I'm the Environmental Director for the State of Colorado testifying this morning on behalf of the State of Colorado and also on behalf of NGA. The first thing I'd like to request is that you allow me to introduce into the record a letter from Governor Roy Romer of Colorado urging the passage of Senate Bill 1140.

Senator **Burdick**. It's received. (See p. 94.)

Mr. **Looby**. Also, I'd ask that you allow us to introduce into the record the report that Ms. Gregoire mentioned a moment ago prepared by the National Governors' Association and the National Association of Attorneys General.

Senator **Burdick**. It will be received without objection. (See p. 95.)

Mr. **Looby**. As you know, Colorado has been blessed with two infamous Federal facilities, Department of Energy's Rocky Flats Nuclear Weapons Plant northwest of Denver and the Department of Defense's Rocky Mountain Arsenal Facility northeast of Denver. We've had both sites exhibit enormous environmental contamination problems, and they've had a long history of non-compliance with Federal and State environmental laws.

It's been a long and arduous process for us to try to achieve some progress, but some progress is being made, but there is still—and this is a key point—there is still significant non-compliance at both of those facilities. We've attempted to enforce the State Hazardous Waste Management Act, which is delegated through RCRA, at the Rocky Flats Plant and Rocky Mountain Arsenal through several compliance actions since the mid-1980s. Our efforts have been hindered by the lack of clear penalty powers.

We have also been stymied for years by Federal agency efforts to avoid regulation of some highly toxic waste streams using their various legal theories. For instance, the magnitude of violations and non-compliance at the Rocky Flats Plant in the mid-1980s would have likely resulted in substantial penalties under our hazardous waste laws had there been clear direction that those penalties could be applied.

Perhaps such penalties would have attracted enough attention from law makers and budget writers several years before the FBI needed to raid the plant last summer. We had 70 or so agents raid the Rocky Flats Plant last June. It's a sad state of affairs, we believe, when we have to depend upon the FBI and raids of Federal facilities in order to get the attention of the managers in the Federal agencies.

Cleanup and proper management of the hazardous and radioactive at the plant would be much further along today if there had been clear penalty powers in existence. States throughout our country have been struggling to force Federal agencies to clean up contamination and manage their hazardous and radioactive waste responsibly for years. It is because of these collective struggles that we cooperated with NGA and NAAG in preparing this report and the recommendations earlier this year.

This report utilized a task force of members of both parties in preparing the recommendations and was unanimously adopted by the Governors earlier this year, so there's clear bipartisan support for the recommendations in it. Ms. Gregoire mentioned a couple of the recommendations that are directly relevant to your testimony today, and I won't repeat those.

While Congress has wisely provided the policy direction in RCRA, the Federal agencies are supposed to comply with Federal and State environmental laws to the same extent as private facilities, their track record is clearly less than what we would expect. They've had a poor track record in doing so. They've also fought application of our enforcement powers nearly every step of the way.

Our ability to force the Federal agencies to comply has been complicated by the Justice Department's unitary theory of the executive and the sovereign immunity waivers that they claim. They have attempted not only to limit State authorities, but also to make sure that EPA's enforcement powers against sister agencies in the so-called Federal family are not exercised.

We believe that while RCRA 6001 already waives sovereign immunity, obviously, you've heard this morning that some courts have upheld different views. This must be fixed, and Senate Bill 1140 is the way to fix it. The Federal Government should be leading the way and setting the pace on environmental compliance, not finding legal theories to throw in the way of State and EPA when trying to force the cleanup.

One of the specific recommendations that we believe is essential is for the clarification of 6001 that occurs in Senate Bill 1140 to clearly waive the sovereign immunity provisions. It's through full enforcement that we will be able to seek and impose a complete range of sanctions and penalties for non-compliance against private facilities.

Equity demands that we achieve the same level of performance from our Government agencies as we insist upon from private companies. We need to move away from the self-regulating and self-enforcing approach that Federal agencies have sustained for too long and give clear and unequivocal direction to these agencies that EPA and the States are fully empowered to enforce the environmental laws at these sites.

This clear direction occurs from Senate Bill 1140, and we support its passage and urge you to oppose any weakening amendments.

Clear removal of the sovereign immunity waiver, we believe, we will stimulate faster compliance with our environmental laws and act as a significant deterrent to future violations in Colorado and throughout the country.

This unfettered ability to use these powers has worked well at numerous private sites, and we expect the same to be true at Federal sites once this issue is clarified and Congress provides explicit direction to the Federal agencies that continued non-compliance is no longer acceptable to the States and to the people of this country. Thank you.

Senator Burdick. Thank you.

[The letter from the Governor of Colorado and excerpts from the report previously referred to follow:]

STATE OF COLORADO

EXECUTIVE CHAMBERS
136 State Capitol
Denver, Colorado 80203-1792
Phone (303) 866-2471

Roy Romer
Governor

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May 1, 1990

The Honorable Quentin N. Burdick
U.S. Senate
SH511 Hart Senate Office Building
Washington, D.C. 20510-3401

Dear Senator Burdick:

I am writing to express my support for S. 1140, a bill that would significantly enhance a state's ability to ensure that federal facilities comply with state hazardous waste laws. It clarifies the existing waiver of sovereign immunity in Section 6001 of the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq. The bill also improves the U.S. Environmental Protection Agency's ability to enforce federal law at federal facilities. The need for greater enforcement authority has been amply documented elsewhere, including the recent report of the NGA-NAAG Task Force on Federal Facilities, a copy of which is enclosed.

Civil penalties effectively deter private entities from violating pollution regulations, and also would be effective for federal agencies. Ultimately, this deterrent will save federal tax dollars by reducing expenditures for cleanup of contamination caused by noncompliance with environmental requirements.

Clarifying RCRA's waiver of sovereign immunity also is an equity matter. Presently, there is no doubt that states and local governments and private entities are subject to penalties when they violate federal or state environmental requirements. If EPA can impose and collect fines from small cities or counties for their violations, it is only fair that the federal government also be subject to penalties.

Last fall, the U.S. House of Representatives overwhelmingly passed H.R. 1056, the House companion to S. 1140. The NGA-NAAG Task Force, on which I served, has recommended passage of legislation such as H.R. 1056 and S. 1140. This recommendation was adopted unanimously by the National Governors' Association and the National Association of Attorneys General. I urge you to move S. 1140 rapidly through committee and to support its passage.

Please let me know if my staff or I can be of further assistance.

Sincerely,

Roy Romer

Roy Romer
Governor

cc: U.S. Senator George J. Mitchell
U.S. Senator Max Baucus
U.S. Senator Frank R. Lautenberg

From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities

National Governors' Association
National Association of Attorneys General

Report of the NGA-NAAG Task Force
on Federal Facilities

NOTE: The following is excerpted from the above named report. The report in it entirety is retained in committee files.

Executive Summary

The problems of environmental cleanup and compliance at federal facilities are deep rooted. Contamination and environmental degradation are the result of years of mismanagement and neglect. They reflect noncompliance with federal policies, unclear or inadequate laws and regulations, institutional attitudes that devalue environmental concerns, and the reluctance of federal agencies to work with federal and state regulators. The problems are not, however, beyond solution, and a new attitude has recently been seen in the federal establishment. Building on this new openness, the joint NGA-NAAG Task Force on Federal Facilities makes the following recommendations.

Improve Environmental Compliance

Under federal environmental statutes, federal agencies are directed to comply with federal and state environmental laws to the same extent as private facilities, but many have failed to do so. Although the Environmental Protection Agency is aware of numerous violations, its enforcement powers have been crippled by a Department of Justice policy prohibiting EPA from filing lawsuits or issuing unilateral enforceable orders against its sister agencies. Hamstrung by the Justice Department's "unitary theory of the executive," the nation's chief environmental watchdog is forced to sit by as basic environmental statutes and regulations are routinely ignored at federally owned facilities.

Recommendations:

- Congress should amend applicable federal laws to clearly waive federal sovereign immunity from the application and enforcement of federal and state environmental laws.
- Congress should require that federal facilities conduct environmental management and compliance audits.
- Congress should enact legislation to improve reporting of environmental violations and strengthen EPA's ability to require environmental compliance by all federal agencies.
- Congress should amend applicable federal laws to ensure that all wastes, including nuclear, are within the purview of state and EPA authorities.

Establish Independent Oversight

State and federal regulators face numerous barriers to effective law enforcement at federal facilities. In their attempts to monitor and improve environmental practices on federal properties, regulators have often been thwarted by claims of national security and sovereign immunity, narrow readings by federal agencies of state and federal environmental laws, and restricted access to sites and information. These barriers have resulted in a system in which many federal facilities have become their own guardians.

Recommendations:

- Congress should ensure that state environmental personnel are given full access to sites and compliance data. Security clearances, when necessary, should be approved expeditiously.
- Congress should ensure that federal and state "right to know" requirements apply to federal facilities.
- Federal agencies should submit annual reports to Congress and the states documenting compliance and cleanup efforts in the previous year and identifying the work planned for the next fiscal year. This and other compliance information should be readily available to the public.
- The President should form a state-federal work group on environmental compliance to discuss and resolve federal facility issues at a high policy level.

Set a National Agenda and Deadline for Cleanup and Compliance

While many federal agencies will have to conduct remedial actions at individual sites in the coming years, there exists no overall plan for cleaning up and restoring the environment at all federal facilities. A plan for concerted and expeditious cleanup of all sites is needed.

Recommendations:

- The President should request and Congress should adopt a goal of not more than thirty years for completion of all environmental compliance and restoration at federal facilities. Where feasible at a particular site, cleanup should be accomplished in a much shorter period. Action plans and interim milestones should ensure continued progress toward the national goal.

- Action plans with milestone dates should serve as a blueprint for funding and ensure continued progress toward the national goal.
- Congress or the President should require the development of national criteria to guide decisions regarding priority and phasing of cleanups.

Fund Environmental Restoration and Compliance

Because sound environmental management has not been a high priority for most federal agencies, adequate funds for cleanup and compliance activities have not been requested or budgeted. There is an urgent need for secure, sustained funding for environmental compliance activities at federal facilities. In addition, money must be made available to reimburse states for the costs of overseeing environmental activities at federal installations in the same manner that private facilities generally reimburse regulators for their oversight services.

Recommendations:

- Congress and the President should ensure adequate funding for environmental restoration and compliance activities by all federal agencies.
- Separate environmental restoration accounts should be created within the budgets of agencies facing significant environmental cleanup work.
- Firm federal policies for reimbursing states for the costs associated with oversight work at federal facilities should be established.
- Funds for compliance activities should be treated as operating expenses, and should not be subject to prioritization schemes or other efforts that separate them from operating costs.

Develop Comprehensive Waste Management Programs

Operations at federal facilities over the last forty years have produced huge amounts of hazardous, solid, and nuclear wastes. Little attention has been given to planning for the eventual disposal of these wastes. There is an urgent need for all federal agencies to develop comprehensive waste management programs that address the most serious problems in a prioritized manner.

Recommendations:

- Congress or the President should direct federal agencies to prepare comprehensive waste management plans that are based on the maximum feasible pollution prevention, waste reduction, and recycling, and that provide assurance of adequate capacity to treat, store, or dispose of all hazardous and nuclear materials.
- Where waste treatment and disposal technologies are utilized, environmental regulations must protect public health and the environment.
- Knowledge gained from federal research and development efforts should be shared with the business community to bring new technologies into commercial use quickly.

Conclusion

Restoring the environmental balance at federal facilities will take a coordinated effort at the state and federal level. It will require effort on the part of the President, Congress, and policymakers in federal agencies. If we are to restore the environmental balance, the commitment must be demonstrated in concrete actions. The following are the task force's recommendations for each branch of government. In some cases, however, responsibility may overlap.

The President

Recommendations:

- The President should form a state-federal work group on environmental compliance to discuss and resolve federal facility issues at a high policy level.
- The President should request and Congress should adopt a goal of not more than thirty years for completion of all environmental compliance and restoration at federal facilities. Where feasible at a particular site, cleanup should be accomplished in a much shorter period. Action plans and interim milestones should ensure continued progress toward the national goal.
- The President should ensure adequate funding for environmental restoration and compliance activities at all federal agencies.
- The President should direct federal agencies to prepare comprehensive waste management plans based on pollution prevention, waste reduction, and recycling. These plans should assure adequate capacity to treat, store, or dispose of all hazardous and nuclear waste.

Congress

Recommendations:

- Congress should enact uniform language in all federal environmental statutes clearly waiving federal sovereign immunity from the application and enforcement of state environmental laws.
- Congress should require that federal agencies subject to environmental regulations conduct periodic environmental management and compliance audits. Information gained from the audits should be made readily available to the public.
- Congress should enact legislation to improve EPA's ability to regulate other federal agencies.
- The following sections of CERCLA should be amended: Section 120 (a)(4) should be amended to clarify that state environmental laws apply to federal facilities regardless of whether they are listed on the National Priorities List; Section 120(e) should be amended to require federal agencies and EPA to include the affected state in interagency agreements; and Section 122 (e)(6) should be amended to clarify that it does not impair any federal agency's obligation to comply with an authorized state hazardous waste program.
- Federal law should be amended to bring source, special nuclear, and by-product material within the scope of states' environmental restoration authorities.
- The reporting requirements of the Emergency Planning and Community Right-to-Know Act should be extended to federal facilities that use, store, or release hazardous chemicals in excess of the reporting thresholds.
- Congress should adopt a goal of not more than thirty years for completion of all environmental compliance and restoration at federal facilities. Where feasible at a particular site, cleanup should be accomplished in a much shorter period. Action plans and interim milestones should ensure continued progress toward the national goal.
- Congress should require each federal agency with significant environmental problems to identify in detail its plan for achieving the national cleanup deadline and milestones.
- Congress should ensure the development of a consistent federal hazard assessment process that does not preempt the role of the states in their oversight functions.
- Congress should establish separate funding accounts for environmental restoration within the budgets of agencies facing substantial environmental problems.

Federal Agencies

Recommendations:

- Federal agencies that are subject to environmental regulations should be required to conduct periodic environmental management and compliance audits. Information gained from the audits should be made readily available to the public.

- States should have full access to sites. If security clearances are necessary, they should be approved expeditiously.

- The federal government must move rapidly to delegate to states the authority to regulate mixed waste and to manage the corrective action provisions of RCRA.

- Federal agencies should submit annual reports to Congress and the states documenting compliance and cleanup efforts in the previous year and identifying work planned for the next fiscal year.

- Within the thirty-year national cleanup goal, federal agencies should establish major milestones of target dates and other interim milestones for beginning and ending cleanup at each contaminated site.

- Agencies' funding requests for environmental restoration accounts should be sufficient to ensure that adequate resources are provided and that they are not diverted to other missions.

- Federal agencies should make funding for everyday environmental compliance activities part of operating expenses and not subject to prioritization schemes.

- Federal agencies should establish firm policies for reimbursing states for oversight costs.

Senator BURDICK. Senator Symms, do you have a statement?

OPENING STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

Senator SYMMS. Mr. Chairman, I'll be very brief, and I apologize for being late and missing the first witness. I have another appointment at 11:00 in a committee where we're going to be voting and I'll have to leave.

I would just like to make a very brief statement, if I might. Far be it from me, Mr. Chairman, to step forward and defend the environmental performance of the Federal Government, but I do not find it surprising in the least that the Government entity headquartered on the banks of the Potomac River would operate with a degree of abandon about its impact on the quality of the Snake River, the Scioto River, and the Kennebec River.

The Federal Government is all too detached from the values and demands of many diverse local communities which it operates. My experience is that environmental problems tend to be localized, and the Federal Government is not well suited to become the Nation's environmental conscience.

Consequently, I've long advocated that this committee leave a greater environmental regulatory discretion with the States and less with the Federal Government, but I must say to the committee and my colleagues and the witnesses that my appeals in the past have not necessarily fared well with the majority on this committee who have obviously, with their own actions in the past, felt that we cannot trust the States to care enough about their own environments to manage them adequately without Federal standards, Federal oversight and Federal sanction.

That's why, Mr. Chairman, I view S. 1140 with some skepticism. The proponents of the bill raise a very lofty cry for States' rights, and that has a good ring from my viewpoint in allowing the States to police their own environments, but sometimes I am a little skeptical because of the cries coming from those who have consistently opposed State primacy in every environmental statute that has gone through this committee in the last decade.

So please forgive me, Mr. Chairman, for being the proponent of State discretion that I am, if I do not join in the ballyhoo around this proposal until I've had more time to reflect on it and study it, even though I may yet end up supporting it. My fear is that the bill may serve no purpose but to lay one more level of regulation on top of certain Federal facilities that serve critical National defense needs.

For now, I'm willing to approach the bill with an open mind, and I thank you for having the hearing this morning, and I will be anxious to obtain the insight provided by the testimony given today. I want to thank all these witnesses who have come from afar to be here and testify, and for those of you whose testimony I miss hearing, I will review the record. Thank you.

Senator BURDICK. Senator Lautenberg.

Senator LAUTENBERG. Thank you, Mr. Chairman.

I'm glad that our friend and colleague from Idaho has an open mind about this ballyhoo called the S. 1140. I think the question that he raises is not whether we trust the States, it's a question of whether we can trust the Federal Government to comply to the law. We're not talking about States' rights, we're talking about people's rights. We're talking about the abuse of one's water system, one's environment, one's children's health, one's destruction of a home.

This isn't a State or Federal rights issue, this is the right of citizens to be able to drink their water and to be able to use it for household needs. So I respond to my friend and colleague from Idaho and say this isn't ballyhoo. I think what we're talking about is bull feathers.

So if I may, Mr. Chairman, start with my questions, and I'm pleased to see the witnesses are pretty much uniform on their view of what we ought to be doing. Obviously, the role that I and my colleagues have in this bill needs some encouragement because we think it's excellent legislation that's required, and forgive the immodesty.

Mr. Van Kley, what do you think of the Administration's proposal? Because we see in their written testimony that we should distinguish between fines and penalties for compliance and those for corrective action.

Mr. Van Kley. Such a proposal would gut the very programs that we're trying to enforce in the States. The problem with the term "corrective action" is that that term is no longer used in the narrow sense that the 1984 RCRA amendments used that term. I've found in my negotiations with the Department of Energy, Department of Defense and other folks that they use the term "corrective action" to speak of any sort of cleanup.

If you look at the regulatory requirements that are necessary to prevent pollution of the environment, you'll find that just about every requirement could be called corrective action, so that if you exempted corrective action from penalties, you couldn't enforce much of the program at all. Maybe a few examples would serve to help you to understand us.

For example, I have heard the Federal Government argue that ground water monitoring is corrective action as opposed to just compliance. Ground water monitoring is one of the crucial requirements to avoid pollution of the environment. It's necessary to detect pollution once it occurs. But ground water monitoring is also used in order to determine the degree of cleanup after the pollution already occurred, so would such a requirement be enforceable by the States or, under the proposal of the Administration, would the States be precluded from enforcing ground water monitoring?

Let me give you another example. At Fernald——

Senator Lautenberg. I want to ask another question, so if you can shorten your answer, Mr. Van Kley.

Mr. Van Kley. Sure.

Senator Lautenberg. If I haven't cut you off in the middle of a thought, I'd like to go on.

Mr. Van Kley. Sure.

Senator Lautenberg. I'd like to welcome Mr. Tierney, who I've had occasion to meet and talk with in the past, and get his view about whether or not the suggestion of limiting fines and penalties to Presidential budget requests has any significance. DOE's written testimony suggests that penalties and fines would divert Federal cleanup funds.

Do you think that this suggests that fines and penalties ought to be conditioned on Presidential budget requests or Congressional appropriations? Do we mix our purpose here? If we're going to be diverting Federal cleanup funds, does that suggest that we ought to avoid cleanup? What kind of a perspective does this give you?

Mr. **Tierney**. Senator, that's the same argument we hear every time we try to enforce environmental laws against anyone. They say, well, now that you've caught us, let's not have a penalty, let's just try to make it all well and forget that we broke the law, and in doing so you undercut the very basic moral purpose of law enforcement in the first place.

What today's testimony from all of us is all about, Senator, is that when it comes to Federal facilities, there's no cop on the beat. There is no one there forcing people to pay attention to the seriousness of the problem. If you limit penalties to the size of the budget in any given year, then it makes no sense. There's no relationship between that and the actual seriousness of the underlying environmental problem.

Senator **Lautenberg**. Mr. Van Kley, do you have a view on that as well?

Mr. **Van Kley**. I wholeheartedly share General Tierney's view on that, and I believe that since Congress expressly provided for penalties in 1976 and reaffirmed that in 1984, why should we now exempt them after they have violated the law and incurred those penalties?

Senator **Lautenberg**. Are either of you aware of evidence that States have abused environmental fines and penalties in any way? Has the Governors' Association or the Attorneys General Association?

Mr. **Van Kley**. Absolutely none.

Mr. **Tierney**. No, Senator, and we've had this power, as Senator Mitchell mentioned, in Clean Air and Clean Water and Safe Drinking Acts, and we don't see any difficulty.

Mr. **Van Kley**. We've had the power for 13 years under the Clean Air Act to enforce sanctions, and there is absolutely no evidence that any State has abused that authority.

Senator **Lautenberg**. Well, let me ask you this, Mr. Van Kley. If a Federal agency thinks a penalty is unfair or disrupts its National cleanup responsibilities, can't this be raised with the court reviewing the case?

Mr. **Van Kley**. Yes, Senator, it very well can, and it would be relevant both to the injunctive relief portion of the case and a civil penalty as well.

Senator **Lautenberg**. They're not discriminated against in any way?

Mr. **Van Kley**. Absolutely not. They would be treated just like ordinary private polluting citizens.

Senator **Lautenberg**. Gee, that could be terrible.

Thank you very much, Mr. Chairman. I appreciate it.

Senator **Burdick**. Senator Durenberger.

Senator **Durenberger**. I wonder if each of you would comment on the worst first principle which the Federal agencies will insist be applied. Do you think it's possible to get agreement of any kind on a method to prioritize sites, and if we can't, how are we going to budget the cleanup process?

Mr. TIERNEY. Well, I don't think we could possibly do it today, Senator. I really agree with your opening remarks. Part of the problem is the lack of will, but part of it is the lack of information. You know, most of the information we get about these hazardous waste sites don't spring voluntarily from the bowels of the Pentagon or the DOE. It comes to us because real citizens are complaining about their environmental futures, and as a result of pressure often times from the States or environmental groups, we find out things. I don't know how you'd begin to set priorities any other way.

I would like to say on behalf of the National Association of Attorneys General, and I know I speak for the Governors as well, we are more than anxious and willing to join with the Department of Justice and all of the other agencies to help move the priority process along. We want to be able to establish priorities, but if you eliminate our ability to enforce sanctions and basically say it's okay to break the law in our States without doing anything about it, I don't think that we have resolved the issue at all.

Senator DURENBERGER. Do you all agree with that?

Ms. GREGOIRE. Senator, might I add that we are currently working with DOE in trying to determine our prioritization scheme, and while at first brush that may seem fairly simple and easy to do, what we find in truth and in fact is it is very complex and very controversial.

Let me also say that whatever the worst is today, if that's all we pay attention to, we leave unattended those who would be the worst tomorrow when we could timely and without as much expense take care of them today. For example, at the Hanford Reservation where a plume of contamination is heading to the Columbia River, that could be stopped today. Maybe there's no one at imminent risk today, but that could be stopped so that the expense is not incurred tomorrow at greater expense and greater health and environmental risk.

Senator DURENBERGER. Thank you.

Mr. LOOBY. Senator, I agree with both of my colleagues. I'd also like to reflect upon the previous question just briefly, and it's our view that timely cleanup that results from the exercise of State and EPA enforcement actions will save, not cost, the taxpayers money over the long haul.

Senator DURENBERGER. Let me ask you then a question about States' incentives and the issue of compliance agreements. Is there a particular States perspective on the issue of compliance agreements? In other words, what are the incentives for the States to settle if their authority for sort of unilateral administrative penalties is very clear? I mean, why negotiate if you have the authority to dictate the terms of the agreement?

Mr. VAN KLEY. Senator, I would respond first of all by noting that the States have directed their attention toward these high priority sites and indeed have tried to negotiate agreements at these sites. If you look at what's happening today, the States have had injunctive relief powers available to them since 1976.

They could go to court and get a court order to clean up a site. Many States, such as Ohio, have the ability currently under State law to issue unilateral orders to a Federal facility requiring them to clean up. But we're not using that authority irresponsibly. We are going after the worst sites first, and we are negotiating at every one of these sites.

If you look at the litigation that's happened today, the States have filed against the worst sites: Savannah River, Fernald, and the Portsmouth site. Those are the only three lawsuits. The other sites have had negotiations, and the three lawsuits have also ended in negotiations. There is considerable incentive for the States to negotiate agreements, because if they negotiate, they know they'll get the cleanup they want, whereas if they go to court, they can't be sure.

Furthermore, you can save a tremendous amount in agency and State time and expense burdens to your State by negotiating rather than litigating.

Ms. **Gregoire**. Senator, might I add, as a regulator, one needs to be very careful about thinking one can go on a site such as Hanford and just automatically start bringing out enforcement penalties and administrative orders and so on. We got to the condition that we did in total disregard for the environmental consequences. We have to stop and do a quality job.

That means you set milestones. We are as interested in making sure it's done effectively and efficiently with the taxpayers' money as the Federal Government is, and therefore the States believe in setting out agreements, believe in setting out milestones, and in complying with those milestones, not just haphazard everything has to be done today. It won't work.

Senator **Durenberger**. I need to ask you one other question before my time runs out that relates to this business of incentives for agreement. In my opening statement, I alluded to the possibility of going to some kind of moratoria on the imposition of penalties. I wasn't thinking of that for the ongoing compliance issues, I was thinking about that principally in the cleanup area.

Suppose we suspend a waiver for two or three years as an encouragement for the parties to reach agreements? It seems to me that the attitude at DOD, for example, is changing, they seem to want agreements. Might we find some way to use a waiver of penalties to encourage that?

Mr. **Looby**. We believe that the moratorium approach is essentially an amnesty approach for pollution for the next several years, and we do not support that approach.

Senator **Durenberger**. You do not support it?

Mr. **Looby**. We do not support having a moratorium on the application of our full enforcement powers to these Federal agencies.

Senator **Durenberger**.Usually in the amnesty approach, like tax amnesty and the other things we've heard about, it's an incentive to get somebody to come forward voluntarily.

Mr. **Looby**. Senator, we already exercise a great deal of discretion as we develop the agreements that you were just alluding to in terms of focusing on the worst priorities on a particular site first when we develop our compliance schedules. We clearly, at Rocky Flats, for instance, have two or three facilities or operable units at that site that we want taken care of right away. They're an immediate threat. So we try to exercise that judgment as we develop these agreements.

Mr. TIERNEY. And, frankly, Senator, I don't know how it actually acts as an incentive. I mean, presumably, these Federal officials want to obey the law now. I'm afraid it would just be an excuse for all of us to put this off and put it off. I mean, I filed my lawsuit against the Portsmouth Naval Shipyard in June of 1986. That was four years ago, and there's no end in sight. If you put everything off two or three years and then start tacking on litigation after that, we'll all be old and gray before something happens.

Senator DURENBERGER. Thank you.

Senator BURDICK. Senator Warner.

Senator WARNER. Thank you, Mr. Chairman.

First, Ms. Gregoire, I was impressed with that response you gave about the plume, and I learned a little something from that. That's important. I think you're right on that.

I'd like to move to two other subjects, and I'm going to direct it primarily to the Department of Defense and DOE. As you may know, I serve on the Armed Services Committee, which handles a good deal of the budget of DOE as that portion of DOE's work relates to National defense, which I think is some of your primary concern.

What this bill is doing is giving you the keys to the cash drawer, and I'm not talking about petty cash, we're talking about substantial sums of money. I'm in favor of it, I'm in favor of the concept and the fines and the penalties, but let's discuss what happens to the cash when it's received by the States. What should they do with it? Should we try and write into law restricting those funds for environmental related purposes? Let's start with that.

Or how do we write in adequate protections to dissuade an ambitious Attorney General seeking to run for Senate of the United States by making his fame and record on building up the coffers in the State? Or maybe he's going to run for Governor, and he wants to have a big treasury.

Senator LIEBERMAN. Did I come in at just the right time?

Senator WARNER. Yes, and you're the right man to deal with that question, too.

Senator LIEBERMAN. I yield to my former colleague.

Senator WARNER. Who would like to take that one on?

Mr. VAN KLEY. I would be happy to, Senator. With regard to opening the doors to the Federal Treasury to the States, I think we merely have to look at the 13 years during which time we have had full authority to obtain penalties under the Clean Air Act. I am only aware of three actions that have been brought during that time against the Federal Government. Those three actions have resulted in two penalties so far.

One is in Ohio, in which a $25,000 penalty was assessed for 10,270 days of violation, which works out to $2.43 a violation. It cost us just in Attorney's costs, just for the Attorney General's Office to litigate it, not including personnel time, et cetera, approximately $30,000 to litigate that case. So it's obvious that we don't bring cases like that to raise money from the Federal Treasury. We're better off if we don't bring the case. We bring the case only when it's necessary to protect public health.

With regard to the second case, this is an administrative penalty by the State of Tennessee that's currently being contested, a $10,000 penalty. These are very light penalties compared to what I've seen in the private sector.

Senator **Warner**. Mr. Van Kley, those are accurate historical precedents, but I think history will not dictate the future. When we get into the subject of hazardous waste sites, we're talking about sums that approach the peace dividend. I mean, we're discussing the peace dividend now, and you're in line for a share of that peace dividend as it begins to flow, and that's a separate subject how quickly it will come, but we will have some reduction understandably and justifiably in our defense spending.

But it may well be that those reductions in expenditures for armaments will now begin to be utilized to pay for cleanups which have to be paid for and should be paid for. So we're talking about fairly substantial dollars, and I'm not sure we can adhere to the past as precedent for what's going to take place today.

Mr. **Tierney**. Senator, I've been at this for 10 years, bringing environmental enforcement actions against private and public entities. The bottom line is, as my colleague just said, you don't do it to raise money. You do it to clean up the environment, and you do it to create an incentive so that people don't break the law. It's not a very efficient way to raise cash for the State Treasury.

Senator **Warner**. All right. I accept that in good faith, and I perhaps tried to inject a moment of levity into the hearing——

Mr. **Tierney**. Well, that's all right, Senator, and in terms of Senator Mitchell's seat in Maine, I think he's fairly secure.

Senator **Warner**. I had the very special pleasure of coming to the Senate at about the same time as Senator Mitchell and have enjoyed working with him and have the highest respect for him.

I want to come back to this question. I think we're talking about diverting some of the peace dividend, and you're going to get the attention of Congress, because we're all scrambling out there to see how that's to be expended, and you're going to be up front. You're going to be up front with the peace dividend, you're going to have some keys to that cash drawer.

Mr. **Looby**. Senator, I think you stepped out of the room a moment ago when I made a point that is directly relevant to your question, and that is that this is the best investment you could make if you're looking to protect the long term interests of the Treasury, because the money that is levied in fines will force more timely cleanups, and that will save money.

Additionally, Federal judges are typically the ones that would impose these fines, and, at least theoretically, they would be in a position to consider all the interests, including the Federal interest, in the application of the amounts of those fines.

Senator **Warner**. What views do you have on whether or not we should restrict the use of funds for environmental purposes directly or indirectly in the State? Why don't we just quickly go down the line and yes or no.

Mr. **Looby**. No.

Mr. **Tierney**. No.

Mr. VAN KLEY. No.

Ms. GREGOIRE. No.

Senator WARNER. The second question is how do we structure in this law reasonableness in terms of the levy of the fine?

Mr. TIERNEY. Well, we don't sit as judge here, Senator. There's a whole process—

Senator WARNER. Well, I'm a lawyer, and I have some familiarity with the process.

Mr. TIERNEY. All right. So we're not going to be setting prices. I think you're going to have judges, and defense lawyers. You're going to have a system filled with checks against abuses. We want Federal facilities cleaned up, that's what we want, and we regularly see private businesses coming in, Senator, and saying exactly what basically the underlying implication of your question is, and we work it out. We've worked it out for years. There's no record of any abuse.

Senator WARNER. My time has expired, Mr. Chairman, and if anyone wishes to amplify that question, but that's correct. Some of these cases will not be reviewed by judges as the statute is currently drafted. That's an important point. Thank you, Mr. Chairman.

Senator BURDICK. Thank you.

Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

I'd like to ask the panel what the public health consequences would be if this legislation becomes law compared with the situation that would arise if this legislation does not become the law. What are the public health alternative consequences in practical terms? What's going to get cleaned up, what won't, what portions of statutes will be enforced, which will not?

Mr. VAN KLEY. I think there are two aspects to the response to that, Senator. The first is that if there is no deterrent to prevent future violations, that is going to increase the future cleanup.

Senator BAUCUS. What do you mean there would be no deterrent?

Mr. VAN KLEY. Well, without S. 1140, there effectively is no deterrent. We have to go to court first to get an injunction before we can even stop the violations, and that does not deter someone from violating the law.

Senator BAUCUS. Explain that more fully. Individuals can sue.

Mr. VAN KLEY. I think maybe to use an example from the Fernald case might help to illustrate that. We acquired a document during the litigation against Fernald that talked about the Department of Energy submitting some very important items to EPA. These were things like training personnel to respond to hazards at the facility like fires and explosions, having plans to detect releases, et cetera.

At the time this letter was written, these plans were three and a half years late. The memo recounts a person from the contractor asking DOE where in the world are these plans, why haven't they been submitted? The person from the Department of Energy responded that since EPA doesn't yet have regulatory authority over DOE hazardous waste, no enforcement action could be taken. Therefore, he hadn't pushed it through the system.

Now, an injunction had been available under RCRA at that time for about seven years, but they knew they couldn't get punished until we actually went to court to get the injunction. A private citizen that was subject to sanctions would have never dared to do that sort of thing, and their activities would not have resulted in the expensive cleanup we now have at Fernald.

Senator BAUCUS. Are there any legitimate objections to this statute? We're soon going to hear from the Department of Justice and the Department of Energy, who are going to have some objections. I'd like to hear from you, are there any legitimate objections, and, if so, what are they?

Ms. GREGOIRE. I'll say on behalf of the State of Washington and the Governors' Association there are none. None. The original intent of the Congress was that Federal facilities should be treated like States and local government and private business and so on. If, in fact, that is the intent, as I understand it to have been, there is absolutely no reason to distinguish them.

Senator BAUCUS. Apart from congressional intent, I'm asking the question from a public policy point of view. Can you think of any public policy legitimate objection?

Ms. GREGOIRE. None. None. None. When I listened to Senator Warner talk about the potential that there will be un-amount of fines, State statutes limit how much we can fine. Politics limit——

Senator BAUCUS. What about the worst first question? That is a legitimate concern.

Ms. GREGOIRE. And, again, what we need here is a partnership of the States working with USDOE and Secretary Watkins and DOD and EPA to work on that priority list. That's the way we need to do business, the States want to do that, and the States were the first to invite that kind of action to take place.

Senator BAUCUS. Let me ask the rest of the panel.

Are there any legitimate concerns here?

Mr. VAN KLEY. There are no legitimate concerns. One concern that I would like to——

Senator BAUCUS. All right. Illegitimate concerns?

Mr. VAN KLEY. There's an illegitimate concern, yes.

Senator BAUCUS. What is that?

Mr. VAN KLEY. That is with respect to whether or not the fines would be reasonable. The courts have very well established policies in the case law that establish reasonableness of penalties. For example, they look at how wealthy the defendant is, they look at how much harm was caused, they look at the attitude of the defendant, whether or not it purposely did it or whether someone else, for example, Congress, caused the violation. Those are all taken into account, and that establishes the reasonableness which is established by Federal judges in the Federal system and which are subject to hearings under the State system, even if it's an administrative penalty.

Senator BAUCUS. Mr. Tierney.

Mr. TIERNEY. I've thought for a while, in studying this issue, that this priority issue was troubling. In a pristine State like yours and mine, perhaps the Attorney General would bring a case against a facility which is very low in a National priority. I've thought a lot about that. After a lot of thought, I do not think, this bill is a problem. I think this bill is a necessary precedent to doing something about the National priority system.

If the bill doesn't pass, nothing happens and we just keep going the way we are. If this bill passes, lawsuits will increase and we will learn more about Federal facilities. There will be a major incentive for all of the various sister agencies within the Government to get their act together and to work to establish priorities because it will be an essential defense to the various lawsuits.

If there is the hypothetical abusive case, and we haven't seen any, then the Department of Defense will come into court and say "the Federal Government has a priority list in this country, and this particular matter is so far down the list it doesn't warrant the kind of penalty or the kind of fine or the type of money the State is asking". But if we don't have the bill in the first place, I don't think we're ever going to see the priority list.

Senator BAUCUS. Do you think a judge would legitimately take that into consideration?

Mr. TIERNEY. Well, we're in equity, Senator, and in equity, you have a right to balance the different issues to look to the clean hands of the ligitants. I think that a Federal judge is going to get a sense of the scope of the problem. After a lot of thought, I do not think there are any difficulties. Indeed, to the contrary, this bill is necessary to make the Federal Government decide which is worse so that they can get on with cleanup of our Federal facilities.

Senator BAUCUS. I appreciate that. Frankly, I think when we take up the RCRA reauthorization bill we can address this question. But I agree with you, at least as a preliminary point, it's important that this legislation is passed so that it's clear that the States can bring actions against Federal facilities.

Mr. Looby, any legitimate concerns here at all you want to address?

Mr. LOOBY. I agree with my colleagues. Clearly, the ability of States to work with the Federal Government in addressing priority issues is important. We believe we've started to do that already and would do with all good intentions.

Senator BAUCUS. Thank you. I have no further questions

Thank you, Mr. Chairman.

Senator BURDICK. Senator Lieberman.

OPENING STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator LIEBERMAN. Thank you, Mr. Chairman. I have an opening statement which I'd ask be included in the record.

Senator BURDICK. Without objection, it will be received.

[Senator Lieberman's statement follows:]

OPENING STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM THE STATE OF CONNECTICUT

Thank you Mr. Chairman for holding these hearings. I am particularly pleased to be co-sponsoring this legislation, which I strongly supported as Attorney General of Connecticut and which is a very high priority to the National Governors Association and the National Association of Attorneys General.

There is no doubt that the record of the federal government's compliance with the nation's hazardous waste laws is shameful. As set forth in the House report accompanying the House's legislation, numerous investigations by the GAO have concluded that the federal government has been slow to comply with the waste management laws. In a May 1986 report, the GAO reviewed compliance with RCRA at 17 federal civilian facilities in 12 states and found that half of the 72 waste handlers inspected by EPA were cited for violations; some of these facilities had been out of compliance for more than three years.

At the House hearings, EPA testified that as of March 1989, the rate of noncompliance with RCRA at federal facilities which contained land disposal units was 54 percent. At private facilities, the rate of significant noncompliance with the laws for land disposal facilities at the end of 1988 was 48 percent.

The testimony by representatives from all the Attorneys General in this country supports the findings of GAO. My friend and former colleague Ken Eikenberry from the state of Washington told the House Committee that: "The federal government has failed to comply with state and federal environmental laws and has quite successfully resisted most efforts by states and citizens to enforce these requirements."

As a result of this failure to comply with the laws, there has been massive pollution of our nation's air, surface water, groundwater and lands. We are confronted with thousands of leaking waste disposal units, spills of toxic and radioactive substances and the release of other hazardous materials into the environment. In some cases, the contamination may be following pathways that will threaten the health of nearby residents.

During the 1988 campaign, then Vice President Bush firmly committed to address this problem. He stated: "As President, I will insist in the future that Federal agencies meet or exceed environmental standards and that the government should live within the laws it imposes upon others."

But without this legislation, President Bush's campaign promise becomes becomes merely strong rhetoric on the environment, not backed up by a commitment to action.

The bottom line is simple and something which the most junior prosecutor knows: Without the threat of penalties for failure to obey the law, an enforcement program collapses.

Of course, we would all like to resolve matters through a voluntary process. Federal facilities should be the first in line to sign consent decrees with EPA and the states to correct violations and to clean up the environmental mess that they created—whether through flagrant disregard for the environment or because the practices were not at the time considered harmful.

The states' ability to assess penalties will help to insure that federal facilities exercise care in the future in complying with our environmental laws and that they swiftly enter into agreements to clean up the past messes. The prospect of penalties will also ensure that Federal facilities stick to the consent agreements they sign. Again, all prosecutors know that a consent order without the threat of penalties for noncompliance is an unenforceable agreement.

Finally, I would like to address head-on an issue that repeatedly was raised in the House debate: it's been labeled the over-aggressive Attorney General. The fear is that, once states have the power to assess penalties, the most aggressive Attorneys General will rush out and file lawsuits against the federal facilities. The concern has been expressed that the nation's priorities for cleanup will be turned upside down because the first Attorney General to reach the courthouse will get a court order requiring the federal government to spend its cleanup resources in that state. Because cleanup resources are limited, the federal government argues that the site subject to the court order, which may not pose as great a threat as another site, will be allocated all the money.

I believe that those who advance this theory must not know what is involved in filing a lawsuit. Attorney Generals throughout this country have limited resources. A court case against a federal facility will pit the Attorney General against the vast resources of the federal government in a highly complex and technical matter. Further, the Attorney General will also be involved in a fight against what may well be one of the big employers in this state. Without the evidence that the federal facility is presenting a serious problem to human health and environment, I do not believe any Attorney General would become involved in this type of battle. The decision to file a lawlsuit will not be based on any new power to assess penalties, but rather on the conclusion that this route is necessary to protect the health of the citizens and the natural environment.

Why should the federal government have the right to "set its priorities" any more than any corporation which may be polluting at more than one site or has numerous other worthy demands on its limited financial resources?

It may be that lawsuits by Attorneys General throughout the country will put some pressure on the agencies and OMB and ultimately the President to request the moneys for cleanup. I would view this as a positive outcome of this legislation: It may actually bring about cleanup of our federal facilities.

Senator LIEBERMAN. Thank you, sir.

Senator BAUCUS. If my colleague will yield, Mr. Chairman, I'd like to ask consent that a letter and comments from various Governors in support of S. 1140 be made part of the record.

Senator BURDICK. Received without objection. (See pp. 136–158.)

Senator LIEBERMAN. I would just like to ask a couple of questions of this panel. I appreciate your testimony. I strongly support this legislation. Being a former Attorney General, I suppose that's not surprising, but I feel it very deeply just from the point of view of consistency. I always think that we're being just plain hypocritical if we pass laws and call for strong enforcement of them and don't abide by them ourselves as the Federal Government.

Let me just ask a couple of questions. DOE is taking the position that they believe that any waiver of sovereign immunity should be prospective and have no retroactive effect, and I wonder if the AGs or the others would want to comment on what effect that would have on outstanding cases such as the Ohio and Maine cases.

Mr. VAN KLEY. I suppose that depends on how the language was worded. It could very well adversely impact the cases that are going on, which have been in litigation for about three years now, and impact our litigation, the efforts we've made so far.

Ms. GREGOIRE. I suspect, Senator, that that will add another degree of lack of clarity to the statute that will end up in litigation, and we'll be back here some how many ever years in the future asking for the clarity. Basically, what DOE is suggesting there, as my colleague answered earlier, is that corrective action not be made a part of it, and I suspect that we'll argue in the courts from now until whenever what does corrective mean. I just don't think we're going to get anywhere by allowing that kind of incursion into what I think right now is a very clean, fair way to amend the statute.

Senator LIEBERMAN. I want to hear what Attorney General Tierney's response is, and as part of it, can you help us again, just for the record, try to define a difference between corrective action and compliance action? Because it does seem to me that there's a danger here, just as you suggest, that we may come to a point where all that can be done is to ask for compliance, and still we're left with this legacy of a mess that we'll have environmental consequences for a long time to come.

Mr. TIERNEY. You're exactly right, Senator. It would have an adverse affect on the case that we have currently pending and others. It would drive the whole debate toward some of the less serious environmental problems. We'd be arguing compliance over whether there were labels on containers and lids on cans instead of cleaning up a serious mess.

Earlier, Mr. Van Kley gave a very, I think, accurate description of the confusion that the litigator would have in trying to separate out the two. It's just kind of a lawyer's dream, and we'd spend more money hiring lawyers than we would cleaning up the mess.

Mr. VAN KLEY. I have one more aspect of that proposal that would pose yet an additional danger to the public, and that is what happens if the Department of Energy conducts that cleanup in a manner that is unsafe? Cleanups can harm people, too, just as much as the first pollution does.

Senator **Lieberman**. Right.

Mr. **Van Kley**. What happens if they, for example, take the waste out of the illegal landfill and put it in another landfill that isn't lined, for example, or in some other aspect violates the law? That harms the public, too, and if you're going to exempt that sort of thing from penalties, there's no way to deter the Department of Energy and other agencies from undertaking cleanup in an irresponsible fashion.

Senator **Lieberman**. Let me finally ask this series of questions. In the testimony that we're going to hear in a minute from representatives of the Government, of EPA particularly, there's going to be a recommendation made that legislative language be inserted here to convene a priority setting group consisting of State and Federal officials, and I know you're familiar with the argument. I gather it was asked in an earlier question.

I have a question which I'm going to ask them, and I need not probably ask you, which is why is legislation necessary to have that happen? I still think we should go forward, but just to create the clarity here, I assume that you all, regardless of how and when this legislation moves, would be prepared to enter into priority setting negotiations with the Federal Government within a short period of time. Is that a fair conclusion?

Mr. **Tierney**. It's fair, Senator. There's no need for legislation. In fact, out in the field, we're working with Federal employees for EPA and DOD every day in doing that in practical effect. What is absent in this system, as I said earlier, is there is no cop on the beat. There's no one here to drive the enforcement mechanism to make sure that this whole system of ours actually runs.

Ms. **Gregoire**. Senator, that is going on right now, and EPA is participating right now on a National level with a certain group of States and DOE, and at the specific facilities we are doing that in our negotiations, setting the priorities on the specific sites.

Senator **Lieberman**. For those facilities.

Ms. **Gregoire**. Right. So what you're suggesting here is already taking place on a National level and a site-by-site level.

Senator **Lieberman**. I gather that what will be suggested is something a bit more formal, which is perhaps a National sit down, a working group to create National priorities, which sounds a little bit different from what's going on, and, again, I assume that each of you representing the States would be prepared to enter into those negotiations.

Mr. **Van Kley**. We've been asking for a more formalized objective system for years, and we are very definitely ready to start talking about that.

Mr. **Tierney**. Senator, what I would ask for is the date. We're ready to go.

Senator **Lieberman**. Great. I will ask that question. Thank you.

Senator **Burdick**. I'd like to thank the panel members for their contribution this morning.

Now I call the second panel, the Honorable Richard Stewart, Assistant Attorney General, Environment and Resource Division; the Honorable James M. Strock, Assistant Administrator for Enforcement, U.S. Environmental Protection Agency; the Honorable Stephen A. Wakefield, General Counsel, U.S. Department of Energy; and Mr. David Berteau, Principal Deputy Assistant Secretary of Defense, U.S. Department of Defense.

We will hear from you, Mr. Stewart, first.

STATEMENT OF RICHARD STEWART, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATIONAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Mr. **Stewart**. Thank you, Mr. Chairman. I'd ask for my written statement to be submitted for the record, and I'll just summarize my remarks orally.

Senator **Burdick**. It will be received.

Mr. **Stewart**. Mr. Chairman, for some time now, various agencies within the executive branch have been working on possible solutions to address the issues of Federal facility compliance with our environmental laws. We are now convinced that the basic framework of S. 1140 does provide the right structure for us to sit down with you and members of the committee to finalize legislation which will result in a realistic national strategy for dealing with the environmental concerns of Federal facilities and will greatly enhance the ability of States and others to take action against agencies which fail to comply with the law.

I'm going to discuss these issues briefly and suggest that representatives of the Administration meet with your staff as soon as possible to discuss in detail specific concepts which we believe could result in a bill that will be effective and acceptable to all concerned.

As you know, Mr. Chairman, the House of Representatives passed a somewhat similar measure, H.R. 1056, containing many of the same provisions as S. 1140. The Administration supported the underlying goal of the bill, but there were a number of changes that we suggested. Some of those were adopted; a key change that the Administration proposed in H.R. 1056 and was not adopted was the failure in that bill to expressly distinguish between penalties for ongoing compliance violations and penalties for failure to undertake a cleanup of past accumulated contamination.

S. 1140 in its present form also fails to make this distinction. We would like to work with the committee to develop an amendment to S. 1140 that would make clear the distinction between cleanup on the one hand and ongoing compliance on the other and address other concerns while still preserving the basic goals of the bill.

Before I turn to the important distinction between cleanup and compliance, let me just basically summarize where we are now in the existing law. I think it's common ground that the issue is not whether Federal facilities should be subject to hazardous waste laws. Section 6001 of RCRA makes clear that Federal facilities are subject to both Federal and State laws respecting hazardous waste.

Furthermore, we have made substantial progress on Federal facilities in terms of bringing them into compliance with requirements. If a facility fails to comply, States and citizens can and do take enforcement action, including actions under the citizen suit provisions of RCRA and under applicable State laws, which provide remedies of injunctive relief and follow-up sanctions if compliance is not forthcoming. I note that the State of Ohio has recently filed a contempt action against the Department of Energy for failure to, at least in the State's view, adhere to compliance requirements, so we're getting enforcement now.

As Ms. Gregoire indicated, DOE and DOD have entered into agreements with States to deal with non-compliance and corrective action problems, and those, too, can be enforced by States and, in some cases, private parties. So the basic obligation of the Federal Government to comply with Federal, State and local solid and hazardous waste laws is not at issue. The narrow issue before us is the sovereign immunity of the United States with respect to penalties for violations of those laws.

S. 1140 contains a clear, explicit, effective and sweeping waiver of sovereign immunity, for both civil penalties in the courts and administrative penalties, for violation of hazardous waste requirements. This is a significant change from the existing law where the only Court of Appeals to address the issue has found no sovereign immunity waiver in the existing law, and the substantial majority of District Courts have also reached that conclusion.

The waiver of sovereign immunity for penalties in S. 1140 is sweeping. It does not distinguish between penalties for ongoing compliance and penalties for failure to cleanup past contamination, through either corrective action and major closures. We think this is an important and relevant distinction. The cleanup problem that we're talking about, as Senator Lieberman indicated, involves a legacy, at some limited percentage of the total Federal facilities, of accumulated waste problems that are going to take time and a lot of money and a lot of care to clean up. That's distinguished importantly from the ongoing compliance efforts.

It is our concern that an undifferentiated penalty waiver can skew priorities. Different States and different State Attorneys General have a different degree of aggressiveness and different sized penalties authorized under State law. This can result in a decentralized, uncoordinated enforcement process, instead of an orderly effort through the Federal Government in cooperation with the States to address the worst cases first.

In order to accomplish that sort of coordinated response to cleanup problems, we have been discussing within the Administration some concepts that we would like to work on with the committee. The concept would be to require EPA and Federal agencies first to do the audits that are set forth in S. 1140 at present, and at the same time consult with States and the Congress on the best way of setting priorities to put those priorities for cleanup in coordination with the budget process.

So long as one of those major facilities was in compliance with the cleanup schedule set, they would not be subject to penalties. If they fall off, if they drag their feet, if they deviate from the tight time table that's set and the requirements, then the penalty provisions would come into force. Those are the concepts. It's going to take us some effort—with you all, I hope—to put these concepts into legislative language that's clear, but we look forward to doing that with you. Thank you.

Senator BURDICK. Thank you.

The Honorable Stephen Wakefield.

STATEMENT OF HON. STEPHEN A. WAKEFIELD, GENERAL COUNSEL, DEPARTMENT OF ENERGY

Mr. WAKEFIELD. Thank you, Mr. Chairman, members of the committee. I appreciate the opportunity to discuss with you today the Department of Energy's views on S. 1140.

Let me first say that the Department fully supports the underlying goal of S. 1140, which is to bring Federal facilities into compliance with applicable Federal and State environmental laws. The Department recognizes that its facilities must comply with Federal and State environmental laws, bringing all of our facilities into compliance with Federal and State environmental laws as rapidly as possible is Admiral Watkins' top priority.

The Department recognizes that in order to resolve its environmental problems, the States must play an important role. To the extent S. 1140 brings the States into the process, we find S. 1140 to be helpful. While fines and penalties are an important tool to ensure environmental compliance, we must all recognize, however, that they are but one of several tools that should be used in a coordinated effort to comply with environmental laws and clean up waste problems. If taken alone, fines and penalties may be a blunt instrument which could be counterproductive to our cleanup efforts. We must make certain, Mr. Chairman, that the Federal Government cleans up its worst environmental problems first. To that end, we must establish cleanup priorities and allocate resources in a rational, orderly and coordinated manner.

While we're making substantial progress in entering into 24 and currently negotiating 27 other compliance and cleanup agreements, we do have some concerns in this area. First, we should distinguish DOE's compliance problems from its waste cleanup problems. Admiral Watkins' initiatives and the cultural changes he has instituted at DOE are designed to ensure that DOE facilities comply with environmental laws and immediately correct any violations that may occur.

Waste cleanup, on the other hand, requires long term planning, implementation and funding. It also requires significant development of technologies, which, in many cases, presently are not in existence. As a result, because we have so many complex and difficult environmental cleanup problems at our facilities which require significant planning and resources to correct, we must develop a strategy to address these cleanup problems in an orderly and comprehensive manner.

Stated simply, it is technically and financially impossible to clean up immediately the materials which were generated during 40 years of production and environmental waste, and it's wasteful to try to do so without establishing National priorities to ensure that the most serious problems are addressed first.

With broad public participation, including that of the States, as you heard from the earlier panel, we have developed a five-year plan for environmental restoration and waste management that seeks to start this process in a unified and coordinated fashion. In granting the States the authority to impose fines and penalties, as

S. 1140 does, we must be careful, Mr. Chairman, not to allow priorities to be determined on any basis other than cleaning up the most serious problems first.

The Department believes that S. 1140 should be amended to include a prioritization process whereby the Nation addresses its worst environmental problems first. Such a prioritization must include the States as key players. Once that program is in place, we would anticipate that fines and penalties would be available to the States for cleanup as well as compliance actions.

Second, for the compliance and cleanup agreements to be truly effective, they must identify and then address all of the environmental problems at a facility. We need to make clear to our employees and our contractors that prompt, good faith efforts to disclose environmental problems and to move promptly toward compliance with environmental laws through compliance agreements are the goal of our new management culture and that these efforts will not put those acting in good faith in jeopardy.

Third, as I stated earlier, the Department supports the concept of S. 1140 to the extent it promotes compliance with environmental laws. With that in mind, we believe that any waiver of sovereign immunity should be prospective, since imposition of fines and penalties for past transgressions does not promote the process of getting into compliance. I will say, as was discussed with the earlier panel, that ongoing cases should not be affected by this legislation, and we believe that appropriate language can be drafted so that those cases will not be affected by our thoughts here.

Finally, the Department believes that S. 1140 should be amended to provide, as does H.R. 1056, that all funds collected by a State from the Federal Government as a fine or penalty for an environmental violation should be used only for environmental purposes.

In conclusion, Mr. Chairman, let me say that the Department of Energy is committed firmly to having our nuclear defense production facilities comply with all applicable environmental laws. The Department also is convinced of the value of oversight by the affected States and EPA. Solving the Department's waste problems will require long term planning, a National prioritization system, the development of new and cost effective technology, and the mutual cooperation of Federal and State agencies. We would like to work with the committee to incorporate these thoughts into S. 1140. Thank you, Mr. Chairman.

Senator BURDICK. Thank you.

The Honorable James Strock, Assistant Administrator for U.S. Environmental Protection.

Mr. Strock.

STATEMENT OF HON. JAMES M. STROCK, ASSISTANT ADMINISTRATOR FOR ENFORCEMENT, ENVIRONMENTAL PROTECTION AGENCY

Mr. STROCK. Thank you, Mr. Chairman. I'm very pleased to be here this morning, and with your leave, I would like to submit my formal statement for the record and make some brief remarks now.

Senator BURDICK. Your statement will be received.

Mr. STROCK. Thank you.

I'd like to reiterate up front the very strong commitment of Administrator Reilly and the EPA, as well as what I know is the very strong commitment of this committee, to meeting the President's goal of making Federal facilities leaders, not laggards, in compliance with the Nation's environmental laws. With that goal, the EPA is using and will continue to use every tool within its authority to attain Federal facility compliance with environmental laws.

The Agency is working hard presently to bring Federal facilities into compliance with RCRA through enforceable agreements. The Agency is also utilizing the Superfund section 120 process to prioritize and attain cleanup of hazardous substance releases across the Nation. Further, the agency has not hesitated to initiate action against Government contractors who operate Federal facilities. Finally, in appropriate cases, the Government will also use its most draconian tool, criminal enforcement. We have demonstrated this recently at the Aberdeen Proving Grounds in Maryland and at the Rocky Flats installation in Colorado, where EPA special agents and the FBI executed a search warrant last year.

This morning, rather than speak to the subsidiary issues, I would like to focus the attention on the issue raised by Senator Lieberman. That is the issue I believe to be the most important question, specifically, how to ensure that scarce National resources are targeted toward the most significant threats to the environment and the public health. It is our belief that when the issue of National priorities is resolved, other key legal issues will become less contentious as they will no longer serve as surrogates for priority setting.

As the members of this committee are aware, the problem of cleanup of Federal facilities is very much like the problem of cleaning up abandoned hazardous waste sites addressed by Superfund. Under Superfund, the Congress and the President, facing the simultaneous challenge of a major public health threat and the constant need to reassure that regrettably limited resources are targeted to best protect the public health, agreed to set up a National priorities list.

The National priorities list concept underlies all aspects of the Superfund program and assures that cleanup decisions are both environmentally ethical and fiscally sound. An even greater challenge faces the Nation with respect to Federal facility cleanup. Not only are the financial stakes enormous, perhaps into the hundreds of billions of dollars, but there are also other major factors.

The first, of course, is the threat to public health and the environment, but there are also questions relating to National security and defense, relating to the work of dedicated career civil servants, and there are also critical questions of Federalism, eloquently stated by the previous panel, concerning State and citizen involvement in protecting the basic rights of affected individuals.

Mr. Chairman, they say that war is too important to be left to the generals. In the same way, Federal facility cleanup issues facing this Nation as a whole are too important to be left to lawyers or to the Department of Defense alone or the Department of Energy alone, to particular States acting alone, or even EPA alone. What is needed is a National dialogue on setting priorities for National action through the involvement of the Federal Government, both executive and legislative, the States, and public interest groups. In short, all the groups you brought here this morning.

It is heartening that there is a growing recognition of the need for such an inclusive National dialogue as was proposed, for example, by the National Governors' Association and the National Association of Attorneys General in a document entered into the record earlier this morning. Such a dialogue must not be an academic exercise but must be focused toward reporting back to Congress by a date certain with a specific action plan for concerted, inclusive National action.

In closing, Mr. Chairman, I appreciate your consideration and good will, and I am convinced that with the leadership of the President and the continued commitment of this committee that there is a great reason for confidence that Federal facility cleanup and compliance issues can be soon resolved.

Senator **Burdick**. Thank you.

Mr. Berteau.

STATEMENT OF DAVID BERTEAU, PRINCIPAL DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR PRODUCTION AND LOGISTICS, DEPARTMENT OF DEFENSE

Mr. **Berteau**. Thank you, Mr. Chairman, members of the committee. We appreciate the opportunity today to lay out the Defense Department's comments regarding S. 1140.

I'm not in the position, in fact, to say anything other than that, as usual, DOD is a big part of the problem, and any time you talk about Federal facilities, we're always a big part of the problem. In fact, the uncommon thing is that my colleague to my right has a problem that's almost as big, if not bigger, than mine.

But I want to emphasize, I've been in the Defense Department for nine years, and I've only been in the position I'm in now with the responsibility for the environment and for military installation and military construction and so on for about four months. But in those nine years, there has not been, short of the dramatic developments in Eastern Europe and the Soviet Union, a more dramatic change inside the Defense Department than the way our thinking and our approach on the environment has changed in the last year or year and a half.

We have, in my view, come a very long way. I'm just speaking as an interested observer as well as a responsible individual there, and I think we're seeing the dramatic effects of what good work and hard work and strong leadership can do. Senator Wilson testified earlier today about wanting to double the size of the Defense Environmental Restoration Account to a billion dollars, the DERA account.

We, in our fiscal year 1991 budget, in fact, have already proposed increasing that to $817 million, and we have almost a billion dollars additionally in the operations and maintenance account for environmental cleanup. We actually increased in our 1991 budget proposal by over 30 percent over fiscal year 1990 what we're spending this year, and that's with the budget going down by almost 3 percent on top of that.

We have an enormous problem. We've got potentially 14,000 sites, and we've completed preliminary assessments on almost 100 percent of those sites and are in the RIFS process or have completed the RIFS process on over 40 percent of those 14,000 sites. We strongly support the intent of this bill, which is to apply effective environmental compliance incentives to Federal agencies. We feel in concert with the Administration, and I would echo the views of my colleagues here this morning, we can support this bill in the Defense Department with a couple of critical changes that might be made.

We're 100 percent committed to compliance with all the environmental laws and regulations, and we're pledged to satisfying the same requirements, meeting the same standards and obtaining the same permits and so on as required of the private sector. Secretary Cheney has endorsed this and has put his money where his mouth is. We're going to do a better job at quickly correcting violations.

Senator Durenberger pointed out he has seen, in fact, a change in the mood, and I think that is a top down change and a bottom up change, and it is working. We're going to anticipate through our budgeting process our future compliance obligation, and we're going to fund those requirements in the budget request.

Our primary concern, though, continues to be the Department's ability to clean up the worst sites first. We have a lot of sites, Mr. Chairman. We believe the goals of cleanup and compliance can best be served by a program of fines and penalties that provides incentives for, rather than detracting from, those goals. We support the Administration's position that fines and penalties for compliance under RCRA are not objectionable and that, in fact, fines and penalties will serve as an effective tool for use in conjunction with other enforcement mechanisms in an effective compliance program.

But there are important distinctions between day-to-day compliance and the requirements for major cleanups and major facility modifications. In response to earlier comments, I think Mr. Van Kley may have made them, ground water monitoring, for example, could be part of a day-to-day compliance definition, even though for us ground water monitoring stations can be expensive, can be technically complicated, should clearly be laid out as part of a compliance agreement.

In fact, I would go so far as to say we're comfortable letting the States help define what corrective action is. I don't want to put us in the position where we're saying leaving the lid off a paint can is a corrective action and therefore is not part of what we're covering under here. But our most important objective is first of all to identify all the facilities that warrant attention and then optimize the cleanup and compliance of those by maximizing the incentives that accelerate cleanup and foster sustainable compliance.

In response to Senator Baucus' comments, I would add we're not in favor of preserving sovereign immunity for cleanup. What we're talking about is a system that forces the priorities to be fixed and hits us with fines and penalties if we don't follow those priorities. We believe that the Congress and the Federal agencies, in consultation with the States, must be able to set those priorities for cleanup based on worst sites first, and we strongly endorse the concept of that National process, where States will participate fully in the development of the annual cleanup priority.

We think we're evolving a good model for this in Defense, but we would support any process that fully involves all the players, including the States, and which would produce reasonable results. Moreover, it's relevant for all media cleanup and capital environmental improvement projects, and we would encourage the Congress to consider this.

Mr. Van Kley commented earlier in response to Senator Durenberger's question "if the choice is litigation or negotiation, clearly the incentives are to negotiate." The same may not be true if fines and penalties administratively imposed is an option, independent of priorities. It's true that the courts have a reasonableness test here. In fact, I would like to insert more for the record on this, but the facts on the case, for example, the Ohio case under the Clean Air Act that was mentioned, yes, the ultimate penalty imposed was $25,000. What Mr. Van Kley did not tell you was that the original fine imposed was, in fact, $25,000 a day, an amount adding up to over $500 million.

The situation was that they had to go to court to enforce that, the court, applying the reasonableness test, reduced it to $25,000. Under the situation that S. 1140 would impose, in fact, we would then have to go to court in order to overturn that, and we'd wind up spending our money and our time and our resources in litigation rather than in cleanup.

Mr. Chairman, we think we have in place as well an audit process which can give us the information needed to set this prioritization process in place. We have a very strong environmental audit program in each of the services now, we need to be particularly careful we make that audit program work. I've heard a lot of complaints this morning about the Defense Department not coming forward with the information when we know something.

What we're telling you is we intend to do that now, and we have the process in place to identify the problems, to come forward with those problems, to quickly proceed with negotiations on reaching agreement of how to clean those up, and then to put the resources in place to effect those agreements and make that cleanup happen.

What we need is a system that, in fact, will provide us incentives to do that and will allow the resources to be focused on that. We have the information now we need to do that kind of prioritization. We've completed the preliminary assessments on virtually 100 percent of our potential sites, we've got the environmental audit capability and the resources in place to be able to do that, and we're committed to meeting our obligations under any agreement that we sign there.

We fully understand that this obligates us to request in the budgetary process all the funds necessary to meet the deadlines associated with those agreements.

Mr. Chairman, I see the red light on. In conclusion, I would propose that if we can adjust S. 1140 to take account of these concerns, we can produce results. We cannot change the past, but we can start from where we are, and we think we can move rapidly. Through a system of 100 percent internal audits, we can identify the problems, get rapid agreement on the solutions, and begin quickly to execute those agreements. With prioritizations, we can assure that we protect public health and the environment, and we look forward to continuing to work with you in the development of this bill. Thank you again for asking me to be here, Mr. Chairman.

Senator **BURDICK**. Thank you.

Senator Durenberger.

Senator **DURENBERGER**. Thank you, Mr. Chairman. If I haven't yet made it clear, my principal anxiety does not come from TCAAP or New Brighton, but it comes from the fact that we need in the cabinet the whole bill as quickly as possible, and I would love to see this passed, get it on the cabinet bill, and get this passed separately.

So to that end, Mr. Berteau, if you would amplify the record with some of the response to my earlier question regarding would a moratorium on penalties perhaps be an incentive or not?

Mr. **BERTEAU**. It would be an incentive on us, obviously. It's not clear to me that it would be an incentive on all the players, because there are multiple players here, and the degree to which there could be incentives for people to say, well, we're getting close to that deadline, if we stretch it out, then we can administratively impose, I would be concerned that don't trade one set of incentives for another set of incentives, but there is some merit to that proposal.

Senator **DURENBERGER**. Second, I want to welcome Jim Strock back. He was here in the past for some period of time, and we certainly appreciated you when you were here and where you are now, so thank you for being here.

Mr. **STROCK**. Thank you.

Senator **DURENBERGER**. I need to ask a question about my doubts about the efficacy of the National priority setting process which I've already expressed here today. So I want to ask perhaps DOE about priority setting. Watching the DOE process, it seems that a lot more than health and environmental protection are at stake.

Many of the facilities are not operating for safety reasons. I suspect that DOE's first priority is getting back into full production, and I'd be willing to bet if I knew more about the DOE cleanup budget that we'd find there are considerations other than the worst first driving the spending decisions. Even in the Superfund we don't operate on a worst first principle.

So I wonder if the witnesses would enlighten us a little bit as to considerations other than health and environment that should be taken into account in this process?

Mr. **WAKEFIELD**. I think, Senator Durenberger, the first consideration that we should have is that our facilities can be operated safely for the people who are working at the plants and safely for the neighbors of the plant. You mentioned our facilities that are currently shut down. In particular, this would include our Savannah River Site and the Rocky Flats Plant.

The Admiral announced, I believe yesterday, before the Senate Armed Services Committee that he hoped to get those facilities up before the end of this year, but he has made it clear on many occasions that they will not be operated until he is absolutely certain, both in his own mind and through the advice of special panels appointed by Congress and by himself, that they can be operated safely. So I would say that is the number one priority.

We also are concerned that no long standing condition endanger the health of the employees or those in the neighboring areas. Any ongoing situations of this type definitely need to be cleaned up.

Some of the other, more long range problems that we have where there is not an imminent danger to health or to safety or to the environment include radioactive waste that has been generated over some 45 years at a lot of these facilities. This waste was put in tanks that certainly don't meet today's standards at a time when, frankly, nobody thought that much about the environment. Cities poured raw sewage into rivers. We didn't know enough about what we were dealing with. This is certainly not by way of defending where we are today, but this is where we are today, and we need to clean up those facilities, and in a lot of cases we don't even know what is in these tanks. We have to determine what is there to determine how to clean it up, and in a lot of instances the technology hasn't yet been developed. We're doing a lot of research and development to get the correct technology to dispose of these wastes.

So these are the kinds of problems that we're dealing with, Senator.

Senator DURENBERGER. Is there a date in time when you began to have records from the old Atomic Energy Commission or something on disposal?

Mr. WAKEFIELD. I don't know that there's a particular date, but I think it is certainly a problem that in a lot of these facilities we don't have adequate records going back 20 or 30 years as to what is in the tanks. I think certainly in recent years, probably since the 1970s, we have pretty adequate records, but going back beyond the 1970s, we probably don't.

Senator DURENBERGER. Mr. Berteau, would you respond to the question, please?

Mr. BERTEAU. Senator, in our environmental restoration account, and I'll use this current year for an example, we've got $601 million, and we've allocated that based on the worst first priorities, but there are some additional considerations built in. One of them, in fact, is are the sites ready for funding? Because we go through the CERCLA process essentially for all them, the preliminary assessments, the feasibility studies, and remedial and non-remedial action, and we pour the money into places where, in fact, the money is ready to be obligated and we're ready to spend it and where we have reached agreement, obviously, with others on what needs to be done. We have projects I think in every State coming out of that environmental restoration account.

In terms of the degree to which operational concerns or strategic concerns would be folded into that, as I have looked at the allocation of the $600 million that we're spending this year, I cannot recall a single instance where, in fact, the priority of a project for funding was manipulated in order to accommodate that sort of a concern, and I think that was the thrust of your question, basically.

Now, I don't think, in fact, it was an issue in any particular project there that had come up, so there was no place that I'm aware of where there was an attempt to say we've got an operational requirement here that clearly requires us to move this item higher up the list than it would otherwise normally be, and I think that's the thrust of your question.

Senator **Durenberger**. Yes, that, and I'm principally trying to pin down issues other than health, and I'm concerned about how do you accelerate an appropriation decision with regard to facilities that are not in compliance with the law. I mean, when you can demonstrate it's not in compliance with the law, there ought to be an automatic, in effect, qualification once you've got all the data together and so forth, but it doesn't seem to be working that way.

Mr. **Berteau**. No, sir, and admittedly, in the past, we didn't fully fund all the requirements that we were ready to obligate money on. I think we're at the point now where we're doing that, and we will continue to do that in the future, and I would suspect, quite frankly, that Congress, in the case of DOD, will appropriate the funds necessary to do that.

When you get into making judgments across immediate demands where you have major facility investments for air pollution control or for water treatment plants or for hazardous waste minimization facilities, as well as for major cleanup costs in there, those kinds of things are going to be folded into it again, but there again you're still dealing with the fundamental question of public health and safety and immediate impact on the environment.

Senator **Durenberger**. Is there any truth to the trade press rumor that DOD is going to request an across the board exemption from the Clean Air Act so that EPA can regulate military facilities separately or something like that? I think that's something I read.

Mr. **Berteau**. The way those rumors were laid out characterized the proposal which we had made very differently than our intention was in making it, and I have testified on this in other arenas as well. Our original idea was that, in fact, for DOD to operate effectively, there are instances where we need to have some kind of commonality across States and across standards.

We have literally internally recognized that the potential impact of that is that we would have to comply Nationally with the most single strict standard across the board. We were not attempting to characterize anything that we need exemption from strict standards, but rather that what we need is, to be operationally successful at executing our mission, we need the possibility to look at single standards for military unique kinds of processes than evidenced. That's what we're attempting to wrestle with, is how we get it.

It has been characterized as us attempting to, in fact, wind up being exempt from stricter standards, and I think that that characterization is not true.

Senator **Durenberger**. Thank you very much.

Senator **Lieberman** (assuming Chair.) Thank you, Senator Durenberger.

In the order of appearance, Senator Warner.

Senator **Warner**. Thank you, Mr. Chairman.

Gentlemen, earlier you were present when I took some issue with the distinguished majority leader about the message the President was giving and then the message that his deputies, such as yourselves, are now providing the Congress.

I apologize for being required elsewhere and didn't get your direct testimony, but in questioning it seems that there is justification for a belief that the previous Administration was against the waiver of sovereign immunity such as posed with clarity by this legislation.

Walk us through the transition of thinking, because I'm of the opinion now, having talked with several of you, that that thinking has definitely been changed; you so stated in your direct testimony, but I think it would be helpful for the record to talk a little bit about, as we say in the Navy, the change of course and speed on this issue.

Mr. **Stewart**. Let me just say for the Justice Department, Senator Warner, our job is really to obey and enforce the law as it exists. The Supreme Court has said that waivers of sovereign immunity have to be very explicitly set forth and worded, and we did not find the requisite clarity for a penalty waiver in the existing law. So where we really are now is a policy judgment as to whether Congress wants to clarify the law, and on what terms.

Senator **Warner**. Now, that's important. Doesn't the President want to clarify the law?

Mr. **Stewart**. Yes.

Senator **Warner**. Yes. All right. So it's a joint effort by the President and the Congress to remove such ambiguities that may exist, and that's a subject that's for the third branch of Government to arbitrate, but we know now that there is a difference of opinion among the Federal Judiciary, so here we are. We're going to change it. But there may have been some perception there was reluctance to get behind the Congress in its effort to clarify the law. But that reluctance is now gone, am I not correct?

Mr. **Stewart**. Yes, sir.

Senator **Warner**. That's what I mean, the change of course and speed, now let's become full partners with the Congress in the changing of this law.

Mr. **Stewart**. Absolutely, and, as indicated, in setting the priority process for these big, expensive long term cleanup problems that are a separate part of the problem here, we would also think we ought to work with the States in setting out a prioritized approach.

Senator **Warner**. I agree.

Mr. Berteau.

Mr. **Berteau**. Senator Warner, the most fundamental thing I think that has changed in the Department of Defense, two things. Number one, a clear recognition by the operational forces and the operational leadership within the Department of Defense that mission accomplishment, which we have devoted 200 years to believing we orient ourselves towards, is no longer something that you can distinguish from environmental compliance and environmental sensitivity; that, in fact, unless you have that environmental compliance and that environmental sensitivity, it is going to affect your ability to execute your mission. That fundamental penetrating thought is spreading throughout the Department of Defense.

The second thing that's happened is a leadership that is clearly committed to supporting and implementing the actions necessary to execute that kind of change in thought, and that's what leads us to where we are now.

Senator **Warner**. Before my time expires, I want to go to this concern I have for the Federal employee who is implementing the current laws and presumably will be implementing this law. I say this law, the results of this bill and a House/Senate conference, and presumably a signing by the President. What can we do to protect them? For example, if they were held accountable for the violation of a criminal statute, and they're found to be innocent, hopefully, what about their expenses?

Mr. **Wakefield**. We have been very concerned about this, Senator Warner, particularly since the Rocky Flats grand jury began sitting last summer, and we have worked extensively with the Department of Justice to try to come up with a regime under which our employees, first, if they have concerns about their own potential criminal exposure, can talk with a criminal lawyer within DOE to determine if they have a problem. If they do, the lawyer should advise them they can seek private counsel. In the event that they do seek private counsel and are not indicted, they should be able, in most circumstances, to have their legal fees reimbursed. We think this will go a long way toward quelling the fears——

Senator **Warner**. But you're conscious of the need to protect these individuals as we draft this law, and I'm hopeful that you will provide us with such recommendations as are appropriate.

Lastly, Mr. Chairman, I spoke earlier this morning about the need for Congress to appropriate, and while Congress has its right to appropriate whatever figure it wishes, the President's budget reflects again the degree of determination in the Executive Branch to work with the legislative branch in getting adequate appropriations.

Let's start with what the appropriation levels are in the 1991 budget and the disposition of you individually and your respective cabinet or agency heads to see that next year's budget, the 1992 budget, has adequate funding in it, assuming this becomes law.

Mr. **Wakefield**. In the context of where we are now, Senator?

Senator **Warner**. Yes.

Mr. **Wakefield**. I believe we have $3.8 billion for environmental restoration and waste management in the fiscal year 1991 budget. I don't know exactly where the fiscal year 1992 budget will be——

Senator **Warner**. No, it's too early, but, I mean, do you detect in your conferences the determination to put in such funds as may be necessary to implement this statute?

Mr. **Wakefield**. Yes. We will definitely do that, sir.

Senator **Warner**. All right.

The Department of Defense?

Mr. **Berteau**. We have, as I noted earlier, almost $2 billion in the fiscal year 1991 request, a combination of cleanup, compliance money and some military construction money primarily for waste water treatment. We're right now in the process of looking at the 1992 through 1997 program, the services, in fact, just submitted those earlier this week, and we are in the processing of reviewing those in our annual program process. We believe not only do we have the commitment to fund those requirements that are in there, but we think we've actually got the processes in place to identify those requirements and to size them and time them so that we will put the right amount of money in.

Senator **Warner**. Thank you, Mr. Chairman.

I thank the witnesses.

Senator **Lieberman**. Thank you, Senator Warner.

Thank you, gentlemen. Let me just begin in this way. I think listening to you that we all would agree on both sides of the table here that the Federal Government's record in this whole area over the last 45 years has been bad, and maybe we'd go so far as to say shameful, and I must say in the spirit of accuracy that this is a bipartisan legacy. I'm pleased to note, at least within the last 45 years, there were occasionally Democratic Presidents who must have had something to do with this.

I draw an unfortunate parallel that comes to mind. I apologize to the four of you because you weren't involved, but there is an unfortunate parallel between our record here and what we are finding to have been the record of the governments of Eastern Europe in operating what would be private facilities here, that is to say industrial facilities, and having no regard for environmental laws and leaving those countries now in a terrible environmental state.

So I think unfortunately, in this case, the quaint and in some senses substantive notion of sovereign immunity was used as a cover or an excuse for inaction that was intolerable, and I think that we all come to table now accepting that and want to do something about it.

My concern, as I listen to you this morning, is that while, as Senator Warner indicates, there has been a change of course and speed, if I may continue the metaphor, it seems to me that in the interest of equity and consistency between what we ask of private entities and what we ask of State and local public entities, and what we're asking of ourselves and the Federal Government, that we need somewhat more of a change of course and an acceleration of the speed at which the Federal Government is moving in this area.

In what you've said today, you have accepted the responsibility to comply, which is significant, but I fear that you are also setting up a rather strong wall of limitations on that, no penalties for past violations, no penalties for cleanup, and it leaves too many holes, too many gaps.

If I was the head of a corporation sitting here and listening to this today, I'd ask why should the Federal Government be able to set its priorities? I mean, I've got a lot of locations around the country that may be violating environmental laws, and I'd like to decide which ones I clean up first. Not only that, I've got a lot of other claims on my corporate resources. My employees want more money, et cetera, et cetera, why shouldn't I be able to make those judgments instead of being forced by law to do that?

I mean, the fact is that private facilities do face the threat of fines and penalties for past violations, so why shouldn't, for instance, the Federal Government do that? Let me come to this question, if I can, and maybe I'll direct it first to Mr. Stewart.

As you know, under other environmental statutes, the Clean Water Act, for instance, the Department of Justice seeks penalties against municipalities and States which are not complying with environmental laws, and I presume that you believe that those penalties are a helpful deterrent in those cases against the States and municipalities. If that's so, then how do you square that position with your views on the need to protect Federal facilities from those kinds of penalties under several circumstances?

Mr. **Stewart**. Well, Senator, I certainly believe that civil penalties can be an important enforcement tool. Just on the question of changing the law for past violations, I don't know of any private business that's been made subject to retroactive civil penalties by an Act of Congress, and I think that's what, in essence, would be done here if we changed the law with respect to past violations.

In terms of the more general question that you asked, I think the distinguishing factor here is that we are dealing with a national government with a national set of problems where we can set priorities through a politically accountable process, as opposed to a decentralized system where civil penalties could be used to push the course of the ship in an uncoordinated way. So I think that's the distinguishing factor here.

Senator **Lieberman**. Would you sit down with a private company that made the same case and be willing to negotiate priorities as to which actions the Department of Justice would be prepared to do first?

Mr. **Stewart**. Well, often in a consent judgment, if there are limited resources available, we would sometimes negotiate a phased compliance strategy to say, well, at least get this done with your limited resources, and then maybe we'll have to worry about the next problem thereafter. So we do, at the sort of practical negotiated consent order stage, take that into account.

Senator **Lieberman**. Part of what concerns me is what General Tierney said in the earlier panel, which is that we have this acceptance now of responsibility, if I can put it that way, willingness to comply by the Federal Government, but the Federal Government being composed of people, people being by nature imperfect, where's the cop on the beat? Who is going to be responsible for enforcement?

I mean, if the States only have the authority for injunctive relief, which history seems to show is inadequate, what confidence can we have that the Federal Government will, of its own accord, do what should be done?

Mr. **Stewart**. I took to heart your remarks about Eastern Europe. I was with the Attorney General in the Soviet Union on an official visit in October looking at environmental problems, and they have wonderfully stringent laws and no enforcement, so I think it's a very important question.

As we envisage it in concept, there would be, with input from the Congress and the States, a compliance schedule of the sort that EPA often enters into, that would be strict and would be on a definite timetable, and if you fall off of that compliance schedule, then you would be subject to civil penalties. That means the policeman, in the sense of State penalties, would be available for Federal facilities that fell off an agreed upon compliance schedule. That's what we're looking at. So it would be there, but if you can't do anything, and it's going to take three years before something can be cleaned up, there's not too much point in imposing civil penalties right now.

Senator LIEBERMAN. Let me just come back to the earlier point that we made of a semantic difference here. Clearly, from my days as Attorney General in Connecticut, and I'm sure is true with Federal Government, a private entity can certainly be forced to clean up releases that occur at any time or be subject to penalties for that. That is true, is it not?

Mr. STEWART. Yes, sir.

Senator LIEBERMAN. Is it not true that you're asking for something less than that for the Federal Government?

Mr. STEWART. We are asking for what may in practice not be very different from our practice in consent decrees of phasing in compliance that takes time to accomplish. When you have an accumulated problem and it's going to take some time and effort before you can come into compliance, penalties shouldn't be assessed for that future effort until you fall off the schedule.

Senator LIEBERMAN. Let me go to another element of this problem.

Mr. Strock, I want to ask you, on page 13 of your testimony, you recommended, as I suggested to the earlier panel, legislation to convene a priority setting group consisting of State and Federal officials, and my question to you is, isn't legislation really necessary for that to happen?

Mr. STROCK. I hope this won't be taken the wrong way when I say that there are problems with big committees making decisions, and particularly one that would need to be as inclusive as we would envision this would be. As you have pointed out this morning, by the makeup of this hearing, from the beginning through the next group, the interests represented and the differences in views are, in some situations, profound, even though the goal is shared.

We believe it to be very important to have dates certain for accountability for the group to keep everyone on track, to be able to report back to the Congress with, again, very specific action plan steps. We would not wish to have any incentive for people to leave that process or take it less seriously.

Senator LIEBERMAN. So you feel you need legislation to create that order, if I can put it that way, that toughness to the process?

Mr. STROCK. We believe that it's very likely that we would. We want to sit down with you and your staff over the next several days and try to work out specifics as opposed to speaking in a general way, but clearly something is needed to hold down the very specific deadlines and time frames.

Senator LIEBERMAN. Let me ask you this. I have seen some correspondence which indicates that EPA has, to its credit, repeatedly been trying to convene such a group without explicit statutory authority. I've got a letter dated June 13th of last year from Administrator Reilly to Richard Darman at OMB requesting such a discussion. Then on June 30th, a few weeks later, 1989, Hank Habicht, as you know, EPA Deputy Administrator, follows with a letter to Bob Crady at OMB summarizing what the meetings could accomplish and attaching a list of agenda items, participants, and a suggested time, and then just a couple of months ago, on February 12th of this year, Hank Habicht again, this time writing to Donald Atwood, Defense Department Deputy Secretary, recommending that such a dialogue be convened. Have you had any responses to date to those suggestions?

Mr. **Strock**. We've worked very closely with OMB, of course, in preparation for today and also on possible approaches to the legislation now before the committee, and they are very supportive of the concept. What in particular I think is useful at the present time is that given that the attention is so clearly focused by the States, by the public interest groups and the Government, there would be impetus to make such a process work.

Senator **Lieberman**. But up until this time nothing has happened in response to what I believe are the commendable efforts of EPA to initiate them?

Mr. **Strock**. No, it's not that nothing has happened. It's been part of a larger set of issues that, of course, brings us here today. It would be difficult to take it totally separately out of that context. We're hopeful that bringing it in this overall context will be a very useful way to go.

Senator **Lieberman**. Let me ask you then whether pending action by this committee, just to respond to the willingness of the State panel we just heard to sit down with you as soon as possible, they're ready to sit down now, whether the four of you would be ready to enter into such discussions as soon as possible?

Mr. **Strock**. Well, we're ready immediately to start such discussions. The key backdrop for it would be some sense of certainty during that time as to what the underlying law would be.

Senator **Lieberman**. Mr. Stewart.

Mr. **Stewart**. Yes, sir. I join my colleague. I think this is the only way the problem is going to get solved, and I also agree that if we have some firm deadlines and a process to get it done that that would be beneficial.

Senator **Lieberman**. Mr. Berteau.

Mr. **Berteau**. Yes, sir, and, in fact, our response to the letter you mentioned to Secretary Atwood, we're ready to go with that kind of a process.

Senator **Lieberman**. Mr. Wakefield.

Mr. **Wakefield**. Not only are we ready to go, we think it's essential that the States be brought into the process. We have had very good success in dealing with the States in our five-year plan for environmental restoration, and I think it's a very workable plan.

Senator **Lieberman**. I appreciate your answers, and I'd like to consult with other members of the committee, but if it's an appropriate role for the committee to play to convene such a meeting, I'm sure we'd be glad to do it. If not, I think maybe we should be in touch about it. But if there's this willingness on all sides to have such a meeting, it seems a shame not to have it start pending the movement of this legislation, whatever form it takes, through the Congress and hopefully to the President.

I thank all of you for your testimony. Just to repeat what I think we all agree, our record is not a good one here, and to the extent possible, we've all got to work together to hold ourselves to the same requirements that we're holding everyone else. Thank you very much.

The final panel is Ms. Shira Flax, who is a Toxics Specialist at the Sierra Club, and Melinda Kassen, who is the Senior Attorney at the Environmental Defense Fund Rocky Mountain Office in Boulder, Colorado.

Let me ask for order in the courtroom, as they say, and welcome the two of you here, and I see there's an unidentified gentleman sitting at the table.

Sir, could you identify yourself for the record?

Mr. EARLY. Good morning, Mr. Chairman. I'm Blakeman Early with Sierra Club accompanying Ms. Flax.

Senator LIEBERMAN. Good morning. It's nice to have you here.

Ms. Flax, you're first.

STATEMENT OF SHIRA FLAX, TOXICS SPECIALIST, SIERRA CLUB, WASHINGTON, DC, ACCOMPANIED BY BLAKEMAN EARLY, SIERRA CLUB; LINDY CATER, HANFORD EDUCATION ACTION LEAGUE; AND LISA CRAWFORD, FRESH, INC.

Senator LIEBERMAN. Incidentally, may I say that we've gone over the testimony, so please don't feel you have to repeat it, and just talk from your head and heart about what you think we ought to do here.

Ms. FLAX. Fine. Mr. Chairman, I just want to mention that I, in turn, am also accompanied by two citizens. One is Lindy Cater, who is the Executive Director of the Hanford Education Action League, and the second citizen is Lisa Crawford, Head of Fresh, a citizens group around Fernald, and Lisa and her husband were the two citizens that initiated the class action suit at Fernald.

Senator LIEBERMAN. Well, we welcome them and thank them for all they've done.

Ms. FLAX. They're here to answer questions, Mr. Chairman.

I would just like to begin by saying what S. 1140 does. What S. 1140 does is sends a clear message: Obey the law. That message, Mr. Chairman, will be the key to restoring public confidence in the Department of Energy and the Department of Defense. Obeying the law is no substitute for the culture change that the Secretary of Energy wants to do, which we believe he is sincerely trying to implement. Obey the law does not substitute for a consultative process with the States and with affected parties. It simply says obey the law.

What S. 1140 says is that the law will be enforced in the same manner and in the same degree for all generators of waste. That means that no Attorney General can act as if there are no constraints on him or her, that means that no appeal board or judge can act similarly, it means that no one can take unreasonable, arbitrary, capricious actions to enforce the law.

The Sierra Club is asking this committee to pass S. 1140 as written. We are strongly opposed to any amendment or changes in language to this bill for this reason.

I am going to read to you examples of three corrective action sites at Hanford. At one corrective action site, high level radioactive waste and hazardous waste were dumped directly into the Columbia River, a natural resource important to citizens of Washington and Oregon. There was no holding ponds, no treatment, dumped directly into the Columbia River.

In another corrective action site at Hanford, known cancer-causing toxics were dumped directly into soil over ground water. No retention ponds, no treatment, dumped directly into the environment.

Those two corrective action sites do not deserve a moratorium on civil penalty authority. What we need are incentives to reinforce the culture changes that the Secretaries want to implement, incentives to do the corrective action studies right. As my testimony indicate, right now state regulators are not seen as authoritative, and consequently environmental studies are done over and over again, we think at taxpayers' expense.

We also feel that these two sites do not deserve to have a moratorium on civil penalty authority. Citizens believe that a moratorium is only one step in a whole history of resistance to strong environmental regulation by federal facilities.

S. 1140 will make sure that DOE has the law strongly and fairly enforced against it, as any business or city agreement. This committee, by passing S. 1140 as written, will take a key step toward restoring public confidence and credibility in our own Government. Thank you.

Senator LIEBERMAN. Thank you for the statement, and thank you for bringing us back from the legal discussions which are important to what occasion them, which is some of the really outrageously irresponsible of the Federal Government in the past.

Ms. Kassen.

STATEMENT OF MELINDA KASSEN, SENIOR ATTORNEY, ENVIRONMENTAL DEFENSE FUND ROCKY MOUNTAIN OFFICE, BOULDER, CO

Ms. KASSEN. Thank you. Good morning, Mr. Chairman. My name is Melinda Kassen, I'm a Senior Attorney with the Environmental Defense Fund and the Chair of EDF's Radiation Program located in Boulder, Colorado. I would ask the committee to include my written testimony in the record.

Senator LIEBERMAN. It will be included.

Ms. KASSEN. Please accept it as a field report that describes other actions which amply demonstrate the need for S. 1140.

The issue, as one of your staff has said, is one of control. Having the power to issue administrative orders, having the power to impose penalties will put the regulatory agencies in better control of the cleanup and continued compliance at the Federal facilities. Why should Congress grant that authority? I submit that it's fairly obvious that the Federal agencies operating these facilities are unable or have been in the past unable and appear still not to be the best shepherds of environmental compliance and the protection of public health and safety.

Their actions have put citizens at risk. They have forced cities to abandon their local water supplies and exposed citizens and workers to toxic releases that threaten their health and well-being. Executive Branch agencies of the Federal Government must not be allowed to continue to act like scofflaws engaging in activities that mock the environmental laws established by Congress, endorsed by the President, and upheld by the courts.

The argument that if States are given the express authority to impose penalties against Federal facilities that States would use that authority capriciously simply belies reality. Federal facilities tend to be large employers, and the flow of Federal dollars into most communities is perceived as important to their economic health. There is no basis for the conjecture that this positive impact, which also flows from private entities and which has always served in the past to restrain harsh regulation, will be any less strong when the issue of enforcement at Federal facilities arises.

Another criticism of S. 1140 you've heard is that it will potentially divert resources from cleaning up the worst sites first. Most importantly, as the committee members know, RCRA, unlike CERCLA, does not establish a prioritization for the thousands of hazardous facilities around the country. There is at present no Federal system for prioritization. DOE, DOD and EPA all have different systems. The information is not there to do this kind of prioritization now.

To delay would be to delay cleanup for an extraordinary amount of time. Getting 50 States and all of the facilities to agree on a National priority system is truly extraordinary. In the meantime, we've got a contaminated plume headed directly toward Broomfield's water supply in the State of Colorado. Waiting for a National priority system doesn't make sense.

Besides that, essentially what the Federal Government is saying is that a judge would be deaf to arguments of equity, that the States are going to ask arbitrarily, that the attorneys are going to act maliciously. I submit that the one actor that we've definitely seen act poorly are the Federal agencies that have controlled these facilities and that it is sophistry for them to say that in the future they're going to be the good guys and everybody else will be the bad guys.

Senator **Lieberman**. Thank you. Again, I appreciate what you said about the probability that an Attorney General will not casually enter into one of these suits. These are major undertakings. Taking on the Federal Government in a complicated case requires a lot of staff time, which is usually in limited supply, and you're right, the public pressure doesn't go in one way here, because these facilities are normally major employers in the area and thus there's leverage going the other direction to not take them on.

Let me just ask you both to respond a little bit more about some of the statements that we just heard from the Governmental panel and the concern that I expressed that they have come some way in accepting their responsibility to comply, but they are building a wall that limits their compliance so much that there's no real guarantee that we're going to have the kind of adherence to law that we want, let alone the cleanup and protection of people who live around these facilities that we need.

I invite any other responses that you might have to what was said in the earlier panel.

Ms. **Flax**. Mr. Chairman, I would just like to state that, inadvertently, citizens, arguments calling for fences around RCRA enforcement is just one argument in a history of resistance to RCRA regulation. We feel that it is in the committee's hands to decide that that message of resistance will end.

Ms. **KASSEN**. The concept that corrective action should not be a part of this process is anathema to the law that the Congress set up. There is in section 6001 no fence around corrective action for Federal facilities. I don't think that that distinction has ever been made with regard to penalties for private entities or for local city, State, Government facilities. I don't believe that is part of the structure of the law, that it was intended to be or that it makes sense, precisely because of the sort of things that you heard from the first panel.

In Colorado, at the Rocky Mountain Arsenal, you've got an order which various people try to characterize as corrective action or as cleanup. As a practical matter, the Army is attempting to do a cleanup of the infamous basin F, now home of hundreds of different chemicals and sludges, considered to be the key of the square mile that's the most polluted in the country.

The State is attempting to impose RCRA authority over the cleanup of that site, taking the sludge out of the basin and putting it into tanks, taking the sludge out of the basin and putting it into another holding pond. One of the tanks has a leaking liner, the holding ponds don't necessarily work correctly, and the Army is saying that they should not be subject to administrative order for those actions, that they should not be subject to penalty for those actions.

It has been an extraordinary undertaking for the State of Colorado, an enormous drain of resources to have to go play these arguments out in the Federal courts, and it would be much more efficient if S. 1140 were simply passed, making it clear, and they could then spend their resources trying to negotiate how and when the cleanup happens.

Mr. **EARLY**. Senator, if I could comment.

Senator **LIEBERMAN**. Mr. Early.

Mr. **EARLY**. The wall that you describe, I just want to emphasize how very large that wall could potentially be. The first panel in particular hit on a subject I think the committee really needs to reflect upon, what constitutes corrective action.

There is going to be tremendous arguments if you try to put aside corrective action and protect it from penalties as to what is and what is not corrective action. There is, I still believe, a tremendous gap between what the Federal agencies' understanding of what compliance with our Federal laws is and what you and I or a State Attorney General would agree is compliance with our laws.

Ms. Flax' testimony talks about the fact that the Department of Energy is already talking about how we don't really need to put in the 50 groundwater monitoring wells at Hanford that they've already put in because, to them, you don't really need the 50 ground water monitoring wells for compliance. We can do with less.

Our experience in Superfund illustrates how difficult it is to come to the resolution of how much cleanup is enough, how clean is clean. All these problems will be multiplied in a situation where you're trying to wall off some of the cleanup activities from the penalties. I just think it's a huge quagmire.

Ms. FLAX. With the Chairman's permission, Ms. Cater would like to address the committee.

Senator LIEBERMAN. Go ahead. Yes. Ms. Cater, would you please identify yourself for the record, first?

STATEMENT OF LINDY CATER, EXECUTIVE DIRECTOR, HANFORD EDUCATION ACTION LEAGUE

Ms. CATER. Sure. My name is Lindy Cater, and I am the Executive Director of Hanford Education Action League, which is a public interest group based in Spokane, Washington. I am also a member of the State Nuclear Waste Advisory Council in Washington, and as a member of the Waste Advisory Council and Director of HEAL, I have continually been in the position of publicly criticizing the State for not being aggressive enough in its oversight responsibilities with DOE at Hanford.

At the same time, I realize that the State is in something of a David and Goliath relationship with DOE. What I'm hearing today is that DOE is asking you to take what really is just pebbles in the slingshot away from David, and I think that it's important that you not weaken this bill as it's proposed.

Senator LIEBERMAN. That's very well said.

Ms. CATER. I've got a couple other comments. I'd like to respond to some of the things I heard earlier today. I'm concerned when I hear DOE talking about a National prioritization plan. I think that is rhetoric for DOE trying to sweep important environmental problems under the rug, I think each State needs to be involved in a prioritization plan, something like our Tripartite Agreement in Washington State, where the State says what are the priorities at a given site, but please don't allow DOE to pit one State and one site against another, because this is beyond a "not in my backyard" problem. This is a National problem. All of these sites need to be cleaned up.

On one other important point that's come up today, I think it's important that you know just how impatient and how angry citizens are when they are told that the Federal Government does not want to live up to the same responsibilities that it expects of private citizens and business. Then it's a matter of adding insult to injury when we are told that this is being done in the name of National security and that this is sovereign immunity. In this case, the king has done wrong.

I would just finally conclude by saying to you that if you are serious about cleanup, and if you are serious about oversight, you must not allow this bill to be weakened. Thank you.

Senator LIEBERMAN. Thank you. You must be very effective out there in the State of Washington.

Ms. CATER. I try to give them hell.

Senator LIEBERMAN. You do it very well.

Ms. KASSEN. Senator, I would just add with regard to the notion of what this bill might do for citizens, I also sit on something called the Rocky Flats Environmental Monitoring Council. We have monthly meetings; we get somewhere between 50 and 300 people at these meetings; and we hear an enormous amount of criticism of the Department of Energy, but we also hear an enormous amount of criticism directed toward EPA and toward the State. The State is seen as ineffective, as cowardly. EPA is seen as complicitous at having allowed this pollution to go on.

I think that this bill, by giving the regulatory agencies effective weapons to fight the polluter, would help to rectify some of the citizen frustration and anger at the way the system is working and at the Government in general.

Senator **LIEBERMAN**. Amen. Well, I think the message is clear. No retreat. So I hope that the committee will be able to go forward with S. 1140 as it is before us now.

I thank all of you. It's been a long morning, and I thank all of you who sat patiently and waited. Thank you for your testimony and your presence.

The record of this hearing will remain open for one week for further insertions into it. Hearing no other business, this will formally adjourn the hearing.

[Whereupon, at 12:42 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

[Statements submitted for the record and the bill S. 1140 follow:]

Terry E. Branstad
Governor of Iowa
Chairman

Booth Gardner
Governor of Washington
Vice Chairman

Raymond C. Scheppach
Executive Director

Hall of the States
444 North Capitol Street
Washington, D.C. 20001-1572
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May 29, 1990

The Honorable Quentin N. Burdick
Chairman
Committee on Environment and Public Works
United States Senate
SH-511 Hart Senate Ofc Bldg
Washington, DC 20510

Dear Mr. Chairman:

We are pleased that the Committee on Environment and Public Works has begun consideration of S. 1140, a bill that would greatly enhance the states' and EPA's authority to ensure that federal facilities comply with hazardous waste laws. We believe enactment of this bill is essential to ensuring full compliance with the law at federal facilities, and will do much to restore public confidence in the federal commitment to a healthy environment. The nation's Governors strongly support passage of S. 1140 as introduced, and urge you to oppose any efforts to weaken or limit the provisions of this bill.

In 1984, Congress amended the Resource Conservation and Recovery Act (RCRA) with the clear intent of making federal agencies subject to the same standards of compliance and enforcement as non-federal parties. Yet, some federal courts have held that RCRA's waiver of sovereign immunity is ambiguous, and that federal facilities cannot be subject to state administrative orders, fines, and penalties. The result has been further delay in compliance with the law, increased costs for cleanup, increased risk to the environment and public health, and an erosion of public trust in the federal government.

We wish to emphasize several points in support of S. 1140. First, without this bill there will be no "cop on the beat" to ensure compliance with hazardous waste law at federal installations. The EPA is not permitted to enforce the law, and it is simply not acceptable to allow these facilities to continue to be self-policing. Moreover, the deterrent effect of state enforcement has been repeatedly recognized by Congress in the context of non-federal facilities, and federal law requires states to develop effective enforcement programs as a condition for primacy under RCRA. Denying states enforcement authority over federal facilities raises basic questions of equity and fairness.

Second, please remember that the underlying purpose of our hazardous waste laws is protection of the public health and the environment. The serious problems at many federal facilities have been well documented. Adequate enforcement authority has been shown to provide a powerful incentive to compliance, furthering the health protective goals of the law, and reducing ultimate cleanup costs through prevention.

We understand that some federal agencies have raised concerns about the bill, and may propose amendments to limit state enforcement to prospective rather than past violations, to "compliance" rather than cleanup, or to some future time after development of a federal priority system. These amendments would ensure further delay in compliance and protracted litigation as states sought to find the precise limits to their enforcement authorities. Moreover, there is no justification for a system which creates preferential treatment for federal facilities while holding private, state, and local facilities to the law's current strict enforcement standards.

We also oppose any effort to direct or control the expenditure of any fines and penalties collected by states against federal facilities. Once collected these are state funds, and there is no constitutional basis for the federal government to direct their use. Furthermore, we do not allow any other class of violators to direct the use of fines against them.

Both the states and federal government have not only a sovereign right but a fundamental responsibility to ensure the protection of public health and the environment. The clear waiver of sovereign immunity under RCRA protects this right. Both Governors and Attorneys General have identified the ability to seek fines and penalties as critical to remedying the numerous contamination problems at federal facilities across the country. This authority provides a powerful and necessary incentive to compliance with the law and adherence to cleanup schedules and requirements. S. 1140 as introduced provides an opportunity for the federal government to demonstrate its commitment to a healthy environment and represents a positive step towards remedying years of mismanagement and neglect at federal facilities. We urge your support for speedy adoption of S. 1140 without amendment.

Sincerely,

Terry E. Branstad
Governor Terry E. Branstad
Chairman
National Governors' Association

Booth Gardner
Governor Booth Gardner
Vice Chairman
National Governors' Association

May 29, 1990
Page Three

Madeleine M. Kunin
Governor Madeleine M. Kunin
Chair
Committee on Energy and
Environment

Cecil D. Andrus
Governor Cecil D. Andrus
Idaho

Governor William A. O'Neill
Connecticut

Bob Martinez
Governor Bob Martinez
Florida

Richard F. Celeste
Governor Richard F. Celeste
Ohio

Governor John R. McKernan, Jr.
Maine

Rudy Perpich
Governor Rudy Perpich
Minnesota

Governor Stan Stephens
Montana

Mario M Cuomo
Governor Mario M. Cuomo
New York

J Florio
Governor Jim Florio
New Jersey

Bob Miller
Governor Bob Miller
Nevada

Governor Michael Sullivan
Wyoming

April 30, 1990

The Honorable Quentin Burdick, Chairman
Committee on Environment and Public Works
United States Senate
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Burdick:

We are writing with regard to legislation needed to ensure the expeditious and effective cleanup of U.S. Department of Energy (USDOE) nuclear facilities.

Over the past four decades, staggering quantities of radioactive and hazardous chemical wastes have accumulated at USDOE nuclear facilities across the nation. Inadequate past practices and failing storage facilities have resulted in extensive contamination of air, water, and soil. The environment has been compromised. The health and safety of workers and the public have been jeopardized and remain at risk.

As governors of states which host or are adjacent to USDOE nuclear facilities, we are vitally interested in federal efforts to resolve these threats. The wastes at USDOE facilities were generated by national defense and energy programs. Their cleanup and disposal is a national obligation, an obligation too long deferred.

Last spring ten of us joined in urging the Administration and Congress to take decisive action to establish a national program for waste cleanup and environmental restoration at USDOE nuclear facilities. Energy Secretary Watkins has taken an important first step in publishing his five-year cleanup plan. However, no body of law exists to guide the cleanup effort over the long-term and see it through to a successful conclusion.

We are committed to securing legislation which will establish and fund an effective and credible cleanup program. It is in this context that we are providing you our comments on S.1140, the Federal Facility Compliance Act, and S.1802, the Department of Energy Nuclear Facilities Act.

S.1140 is critical to cleanup efforts. Past failures to abide by federal and state environmental laws have contributed significantly to the serious waste problems at USDOE facilities. There can be no effective independent regulatory oversight of these facilities so long as USDOE can claim immunity to enforcement measures. S.1140 will clarify that USDOE is subject to the same enforcement standards under the Resource Conservation and Recovery Act (RCRA) as any other non-federal governmental entity or private party. We urge the Committee to promptly endorse this legislation and push for its enactment.

We also hope that the Committee will consider our comments on S.1802. While we recognize that this bill is under the jurisdiction of the Energy and Natural Resources Committee, we believe that the Environment Committee should be playing a larger role in shaping and directing cleanup legislation.

We are anxious to work with the Committee in forging cleanup legislation which will ensure a clean and healthy environment for our citizens. We hope that you will call upon us.

Sincerely,

Booth Gardner
Governor of Washington

Cecil D. Andrus
Cecil D. Andrus
Governor of Idaho

Neil Goldschmidt
Governor of Oregon

Garrey E. Carruthers
Governor of New Mexico

Richard F. Celeste
Richard F. Celeste
Governor of Ohio

Roy Romer
Roy Romer
Governor of Colorado

Ned McWherter
Ned Ray McWherter
Governor of Tennessee

Bob Miller
Bob Miller
Governor of Nevada

Carroll Campbell
Carroll Campbell
Governor of South Carolina

Wallace Wilkinson
Governor of Kentucky

Enclosure

cc: Members, Senate Environment and Public Works Committee

U.S. Department of Energy Nuclear Facility Cleanup

Comments on

S. 1140, Federal Facility Compliance Act

and

S. 1802, Department of Energy Nuclear Facilities Act

Governor Booth Gardner
State of Washington

Governor Cecil D. Andrus
State of Idaho

Governor Garrey E. Carruthers
State of New Mexico

Governor Ned Ray McWherter
State of Tennessee

Governor Carroll A. Campbell Jr.
State of South Carolina

Governor Richard F. Celeste
State of Ohio

Governor Neil Goldschmidt
State of Oregon

Governor Roy Romer
State of Colorado

Governor Bob Miller
State of Nevada

Governor Wallace Wilkinson
Commonwealth of Kentucky

April 1990

I. Introduction

The purpose of this paper is to provide comments on S.1140, the Federal Facility Compliance Act of 1989; and S.1802, the Department of Energy Nuclear Facilities Act of 1989. S.1140 clarifies that federal facilities are subject to the same enforcement sanctions under the Resource Conservation and Recovery Act (RCRA) as any other private party or non-federal governmental entity. S.1802 attempts to address a wide range of environmental, health, and safety problems at U.S. Department of Energy (USDOE) nuclear facilities.

Over the past forty-five years, operations at USDOE nuclear facilities in 15 states have generated staggering quantities of radioactive and hazardous chemical wastes. Extensive contamination of air, water, and soil has occurred. The health and safety of workers and the public have been jeopardized and remain at risk.

As governors of states which host or are adjacent to USDOE nuclear facilities, we are vitally interested in federal efforts to resolve these threats. We have joined in urging the Administration and Congress to take decisive action to establish an effective and credible national program for waste cleanup and environmental restoration at USDOE nuclear facilities. And, we remain committed to securing legislation which will establish and fund such a program.

II. The Need for Congressional Action

Last April we called on the Administration and Congress to take prompt and decisive action to address the threats posed by the massive quantities of radioactive and hazardous wastes at USDOE nuclear facilities. We urged the establishment of a comprehensive, long-term program for waste cleanup and environmental restoration. We also outlined the essential elements for such a program. These included:

1. A national commitment to complete the cleanup of USDOE facilities within 30 years;
2. A detailed schedule and national priority system consistent with negotiated cleanup agreements;
3. Sufficient long-term, stable funding to ensure the cleanup and disposal of existing and future wastes;
4. An effective regulatory structure, including both state and independent federal oversight and enforcement capabilities;
5. The means to build and maintain public confidence, including responsible participation by and funding of affected states;

6. The development of advanced technologies to ensure safe, thorough and cost-effective waste cleanup and disposal;
7. Increased attention to health impact monitoring and analyses; and
8. A commitment to make use of existing work forces and to ensure their safety.

Over the past nine months, significant progress has been made toward the cleanup program we seek. Secretary Watkins has made environmental restoration and cleanup a top priority for the USDOE and the Administration. His five-year cleanup plan provides the essential framework upon which an effective and credible cleanup program can be built.

In formulating the plan the Secretary actively sought and listened to the advice of the states. As a result, his plan addresses many of our most pressing concerns. It commits to the 30-year cleanup of USDOE nuclear facilities. It pledges compliance with state and federal regulations. Schedules and milestones are being established.

The plan also recognizes the interests of the affected states and tribes and the need to be more open, responsive, and accountable to the public. It calls for organizational changes, a more responsive means of funding cleanup work and the development of new, more efficient cleanup technologies.

Congress has also been supportive of cleanup efforts. Over $1.6 billion was appropriated for waste management and environmental restoration at USDOE nuclear weapon facilities in fiscal year (FY) 1990. This was $360 million more than requested by the Administration and $600 million more than appropriated for FY 1989. This increased funding enabled the Secretary to move ahead with his aggressive cleanup program.

We applaud these actions by the Administration and Congress. They represent critical first steps in the cleanup effort. However, we remain seriously concerned over the long-term prospects for success. The cleanup of USDOE nuclear facilities will span decades and require billions of dollars to complete. While important steps have been taken, there is little assurance that the efforts begun over the last year will be sustained and that the cleanup will be completed.

Protection of the public health and the environment require a firm and lasting federal commitment to the cleanup effort. Only Congress is in a position to make this commitment. Only Congress can establish as law a national goal to complete the cleanup of USDOE nuclear facilities within 30 years and formally put in place the lasting legislative framework needed to achieve this goal.

We offer our comments on S.1140 and S.1802 in this context, and again urge Congress to take decisive action to formally establish a credible, long-term national cleanup program.

III. Comments on S.1140

The passage of S.1140 is crucial to efforts to ensure the safe and proper handling and cleanup of hazardous wastes at federal facilities. The bill clarifies that federal facilities are, under the Resource Conservation and Recovery Act (RCRA), subject to enforcement sanctions including administrative orders and civil and administrative fines and penalties. It also specifically authorizes the Environmental Protection Agency (EPA) to take administrative enforcement action against federal agencies.

Each year federal facilities generate massive quantities of hazardous and radioactive wastes. Unfortunately, these same facilities have some of the most extensive and serious waste management and disposal problems in the nation. Perhaps the most notable are USDOE nuclear facilities where decades worth of hazardous and radioactive waste now jeopardize the public and the environment.

Congress enacted RCRA to ensure the safe and proper handling, treatment, storage, and disposal of hazardous and mixed wastes at private as well as government facilities. It also afforded the states the opportunity to assume responsibility for the administration of RCRA.

Our states have eagerly accepted this responsibility by enacting hazardous waste laws. However, our efforts to ensure compliance at federal facilities have too frequently been frustrated. While some progress has been made, federal facilities continue to lag far behind state and local governmental entities and private businesses in complying with RCRA and state hazardous waste laws. Federal agencies have been quick to raise sovereign immunity as a defense against state enforcement actions. And, while it is clear that Congress intended Section 6001 to waive sovereign immunity, they have successfully blocked state enforcement actions by arguing that the waiver language is ambiguous.

S.1140 would clarify that language. It would provide states the undisputed ability to use enforcement sanctions, such as administrative orders and civil penalties, to induce compliance and discourage improper practices at federal facilities. These measures have long been used at non-federal government and private facilities and have proven to be effective compliance incentives.

The bill will also strengthen EPA's regulatory role in dealing with federal agencies. Under the "unitary theory of the executive" put forth by the U.S. Department of Justice, EPA has been effectively barred from taking enforcement actions against other federal agencies. S.1140 would grant EPA the discretion to take administrative enforcement actions against federal agencies.

The waiver of sovereign immunity granted by S.1140 is not unique. Other federal environmental laws already include similar waivers. Nor would it subject federal facilities to extraordinary enforcement sanctions. In fact, it would end a double standard by making federal facilities subject to the same sanctions faced by any other person, business, or state or local government.

Moreover, we must object to the assertions made by the Department of Defense that passage of S.1140 would be disruptive to federal compliance efforts. If federal agencies are sincere in their commitment to work with EPA and the states to reach compliance with RCRA and state hazardous waste laws, the sanctions allowed by S.1140 will seldom be invoked.

The waiver would not override dispute resolution practices or procedures provided for by law, or in facility compliance agreements. It would, however, help to eliminate protracted and costly judicial reviews during which waste problems and the risks they pose to the public would go unabated. Nor would subjecting federal facilities to administrative and civil enforcement sanctions usurp compliance schedules or priorities negotiated by federal agencies and state regulators. It would, however, provide a strong incentive to ensure that priorities are honored and compliance milestones are met.

Given the serious waste problems at federal facilities in general and USDOE facilities in particular, there is simply no longer any justification not to hold federal agencies fully accountable for compliance with RCRA and state hazardous waste laws. Effective oversight and enforcement are critical to ensure such accountability. We strongly urge the quick passage of S.1140.

IV. Comments on S.1802

A. General Comments

S. 1802 attempts to address a broad range of environmental, health, and safety problems at USDOE nuclear facilities. While we have comments on most of the bill's titles, there are several titles which are generally consistent with our position paper issued last April. These pertain to USDOE organizational changes, OSHA applicability, epidemiological research programs, whistleblower protection, and cleanup technology development.

However, the titles addressing cleanup compliance agreements, model regulations, and the definition of mixed waste would seriously threaten an effective and credible cleanup effort. They would substantially diminish the independent regulatory role of the states and promote the return to "self-regulation" and a "double standard" for the handling and disposal of hazardous wastes.

The lack of independent oversight and past failures to fully comply with established state and federal regulations are major causes of the serious waste problems now facing USDOE. Rather than creating a regulatory environment which perpetuates these weaknesses, S.1802 should ensure that USDOE facilities are brought into compliance with existing regulations through state and federal regulatory programs.

Finally, while the bill covers a wide range of issues, it fails to address one of the most critical: adequate and stable long-term funding. The success of cleanup efforts is totally dependent on a firm commitment to provide required funding in a timely manner. In our position paper, we stressed the need for Congress to establish not only a dedicated cleanup fund, but also the means to initially capitalize and annually replenish the fund. Secretary Watkins also calls for a dedicated cleanup fund in his five-year plan.

We urge that S.1802 be amended to provide a workable long-term funding mechanism.

B. USDOE Organizational Changes

Title I of S.1802 would create an Office of Environment, Safety, and Health and also an Office of Waste Management and Environmental Restoration within USDOE. Each office would be headed by an Assistant Secretary.

We support the concept that legislation is needed to elevate the importance and strengthen the administration of waste management, environmental, health, and safety functions within USDOE. The agency's organizational structure must recognize and treat these functions as primary elements of its mission. It is not clear to us, however, that the proposed changes would accomplish this purpose.

The purposes or reasons for the proposed action need to be defined. At a minimum, the Title should specify the roles, responsibilities and authority of each of the proposed offices.

C. Application of OSHA to USDOE Nuclear Facilities

Title II of S.1802 directs that Occupational, Safety and Health Administration (OSHA) regulations be promulgated and applied to USDOE nuclear facilities. We concur very strongly with the intent of this Title and believe OSHA should be strengthened to meet this task. We do, however, take exception to the prolonged implementation period as well as several elements of the proposed implementation process.

Application of OSHA standards and regulations at USDOE nuclear facilities is long overdue. Inadequate past practices and measures have, at times, placed workers needlessly at risk. Delaying OSHA applicability at USDOE nuclear facilities for another five years, as proposed in this Title, is simply not acceptable. Moreover, the proposed amendment to the Occupational Safety and Health Act of 1970 would limit applicability to only USDOE facilities "involved in defense production missions." We believe that the applicability must extend to all USDOE nuclear facilities as defined in Section 2 of the bill.

Title II directs the Secretary of Labor to promulgate regulations which will specify the occupational safety and health standards to be applied at USDOE facilities. We are concerned that such guidance will result in a separate standard of performance being set for USDOE. The Title should clearly indicate that USDOE will be subject to all existing and applicable standards, and should direct the Secretary of Labor to adopt additional standards when existing standards are found to be inadequate to ensure worker protection.

Finally, we agree with the direction to the Secretary of Energy requiring the preparation of an implementation plan for OSHA regulations. We also agree with the direction to provide the public with an opportunity to comment on the plan. However, given the number and regional distribution of USDOE nuclear facilities and the varied worker environments they present, three public hearings will not be adequate. More importantly, implementation of the plan must be mandatory, not discretionary as permitted by this Title.

D. Radiation Research

Title III of S.1802 relates to research on the health effects of radiation. The purposes of the Title are to provide for the creation of a repository for epidemiological data and to afford "qualified independent" researchers access to such data. The Title would also direct the Secretary to establish a professional panel to review and make recommendations to Congress on USDOE's epidemiological data management and research programs.

We strongly concur with the purposes of this Title. The availability of, and access to epidemiological data is critical to the thorough and balanced evaluation of radiation effects on the health of USDOE workers.

We also concur with the need to carefully review how USDOE administers and conducts its epidemiological research efforts. Of particular concern to us is the ability of USDOE to conduct an impartial and credible research program given its vested interest in the outcome. We urge that serious consideration be given to transferring these research functions to an independent entity or otherwise subjecting them to outside oversight or review.

However, while we concur with the purposes of this Title, we must question the timeliness of the approach being proposed. Secretary Watkins has already appointed a panel of outside experts to review the agency's epidemiological programs and data management. It is our understanding that the charter of the Secretary's panel is essentially the same as that proposed in this Title. Moreover, the final report of the panel's findings and recommendations is expected this spring.

Given this situation, we recommend this Title be withdrawn and redrafted after the report of the Secretary's panel is released and evaluated.

E. Radioactive Waste Remediation Research

The stated purpose of Title IV of the Act is to establish a program for research, development, and deployment of improved technologies for the management of mixed radioactive and hazardous wastes. Such a program has already been proposed by the Secretary of Energy.

We strongly support the establishment of such a program. The development and implementation of advanced technologies are critically important to a safe, thorough and cost effective cleanup effort. The scope of the program should, however, address the handling and cleanup of all radioactive and hazardous wastes at USDOE nuclear facilities, not just mixed waste.

We also believe that the Title should provide explicit direction that the development of new technologies must be sensitive and responsive to applicable federal and state regulatory programs and requirements. To this end, research and development efforts should be directed and conducted jointly by USDOE and the Environmental Protection Agency (EPA). The agencies should be directed to enter into a formal agreement for coordination of these efforts. The states, as regulators, should also be included in the planning and review for research and development efforts.

Finally, there are several elements of this Title which are not relevant to the stated purpose and to which we take exception. Most significant is the program proposed in Section 403 for the development of model standards and regulations for the disposal of mixed wastes generated at USDOE nuclear facilities.

The process for developing the model standards and regulations is contrary to existing statutory requirements and implementing programs. Both EPA and USDOE have acknowledged that mixed waste is subject to regulation under the Resource Conservation and Recovery Act (RCRA). In enacting RCRA, Congress gave EPA and states with delegated authority the power to establish cleanup standards and regulations. This Title would strip EPA of its lead authority for developing standards and regulations and exclude the states entirely.

In addition, Section 403 would set a "double standard" for the disposal of mixed wastes. We fail to see how mixed wastes generated at USDOE nuclear facilities differ from mixed waste generated at any other nuclear facility. Past exemptions from federal and state environmental regulation have contributed significantly to the current waste problems at USDOE nuclear facilities. It is time to end this practice and move these facilities into full compliance with established regulatory programs.

Section 403 is unnecessary and should be deleted. At a minimum, it should be revised to simply direct EPA to consult with the Nuclear Regulatory Commission (NRC) when developing or revising standards for mixed waste. The definition of mixed waste contained in this Title should also be deleted. Focus should be placed on the adoption of a single definition for mixed waste as Title VII of the Act attempts to do.

F. Whistleblower Protection

Title VI of S.1802 would extend to contractor employees at USDOE nuclear facilities the same whistleblower protection now afforded to employees at NRC-licensed facilities. We support this measure. The capability of an employee to come forward to report unsafe or illegal practices without fear of reprisal is important to ensuring safe operations at USDOE nuclear facilities.

G. Mixed Hazardous Wastes

Title VII of the Act attempts to clarify the definition of solid waste as it applies to mixed wastes. We agree such legislation is needed, but this Title is ambiguous and goes too far in exempting mixed waste from regulation.

The Title states that source, special nuclear, and byproduct materials are exempt from regulation under RCRA. Yet, it is not clear whether this exemption applies when these materials are found in combination with hazardous materials. The Title also excludes wastes emplaced in a repository, as defined in section 2(18) of the Nuclear Waste Policy Act; or in the Waste Isolation Pilot Plant (WIPP), from regulation under RCRA. It is not clear, however, whether this exclusion applies only to these wastes once actually placed in the repositories or whether it also applies to the treatment or storage of these at USDOE nuclear facilities.

EPA and USDOE have both acknowledged in the Federal Register that mixed wastes are subject to regulation under RCRA. Representative Luken has introduced HR 2708 to formally clarify that it is the intent of Congress that mixed waste is subject to RCRA regulation. HR 2708 is clear and is consistent with the EPA and USDOE determinations.

We also note that USDOE has committed to comply with RCRA standards in the construction and operation of the WIPP facility. We know of no sound technical rationale for dismissing this commitment. Indeed, we are concerned that such an exclusion could trade away public health and safety to simply expedite the opening of WIPP. While we support the expeditious opening of WIPP, we are adamantly opposed to any effort to exclude radioactive mixed wastes destined for WIPP from regulation under RCRA.

For these reasons, we find Title VII to be unacceptable as currently written. It should be deleted and replaced with the text of HR 2708.

H. Nuclear Facilities Cleanup Compliance Agreements

Title VIII of S.1802 addresses the negotiation, implementation and enforcement of cleanup agreements for USDOE nuclear facilities. We strongly believe that compliance agreements are essential elements in the cleanup effort, but this Title is both perplexing and troubling.

The primary goal of an effective and credible national cleanup program for USDOE nuclear facilities must be compliance with federal and state environmental laws. Many of the waste problems at USDOE facilities are the direct result of past "self-regulation" and failure to comply with environmental regulations.

Protection of the environment and public health and safety demand that these past practices be quickly brought to an end, and that USDOE come into compliance through established regulatory processes. Unfortunately, this Title would not only perpetuate many of these past weaknesses, but endorse them.

Specifically, we note:

1. A compliance agreement may only be negotiated after the Secretary of Energy determines that a facility is not in compliance with federal and state environmental laws. This provision usurps the authority of EPA and the states as regulators to determine compliance and transfers it to USDOE, the regulated party and potential violator.

2. The scope of the agreement appears to cover only violations which require cleanup or abatement. Other procedural and operational requirements for compliance such as record keeping and monitoring would be largely excluded. These additional measures are crucial to ensuring the safe and proper handling of wastes and to avoiding future cleanup problems.

3. Once in place, a compliance agreement would in essence establish a new regulatory process by entirely replacing or superseding federal and state environmental laws in defining required compliance actions. The process set up by a compliance agreement would apply not only to known violations but also to new violations and to violations in existence but unknown at the time the agreement was put into force, unless the violations are the result of wilful misconduct.

4. Title VIII would, in effect, virtually exempt USDOE and its contractors from liability for any violation occurring during the negotiation of a compliance agreement.

5. Title VIII would obstruct a state's ability and right to seek judicial review of violations of the agreement. A state would first have to request the Attorney General of the United States to pursue enforcement. Only if the Attorney General or the Secretary failed to take enforcement action within sixty days could the state initiate its own action. It is seriously questionable whether the interest of a state against a federal agency could be adequately represented by the U.S. Attorney General. Further, there is no recourse for a state should the action by the Attorney General be inappropriate or inadequate in the state's view.

6. Title VIII would eliminate the opportunity for citizen suits. RCRA and other federal environmental statutes specifically provide for such actions.

Title VIII is simply unacceptable as now written. It should be either be deleted entirely or extensively revised to remove these inappropriate provisions.

The Title must ensure that compliance agreements will provide an enforceable and effective means to implement, rather than circumvent, existing federal and state regulatory programs.

V. Conclusion

Radioactive and hazardous chemical wastes have been allowed to accumulate at USDOE nuclear facilities across the nation for decades. As the result of inadequate past practices and failing temporary storage facilities, these wastes now pose a serious threat to the public and the environment.

As governors from states hosting or adjacent to USDOE nuclear facilities, we have joined in calling for decisive federal action to establish a national waste cleanup program for these facilities. Secretary Watkins' 5-year plan provides the basic foundation upon which an effective and credible cleanup effort can be built. Congressional action is critically needed, however, to reinforce and bolster this plan, and to ensure that the commitments made are carried through to completion.

S.1140

Full and timely compliance with federal and state environmental laws is crucial to the cleanup and safe operation of USDOE nuclear facilities. Many of the waste problems faced by USDOE stem directly from the past failure to comply with these regulations. There is simply no longer any justification not to hold federal agencies fully accountable for compliance with RCRA and state hazardous waste laws. Effective oversight and enforcement are critical to ensure such accountability. S.1140 provides for the use of needed enforcement sanctions. Its passage is essential. We urge the Senate Environment and Public Works Committee to take prompt and favorable action on the bill.

S.1802

S.1802 attempts to address many of the elements essential to the cleanup effort. While many of the provisions are commendable in their intent, we find that, on balance, we cannot support or endorse the bill as currently written. The titles pertaining to cleanup compliance agreements, model regulations, and the definition of mixed waste are particularly troubling. They would perpetuate past regulatory weaknesses and deficiencies. They would be contrary to established federal and state regulatory standards and programs. And, they would jeopardize the progress made over the last year as well as the long-term prospects for an effective cleanup effort.

Further, the bill remains silent on one of the most critical issues: adequate long-term funding to support cleanup efforts. Without such funding, the cleanup effort will fail. Only Congress is in a position to make the long-term funding commitment required.

We urge that S.1802 be revised to provide the framework and means to ensure the cleanup of USDOE nuclear facilities through full compliance with federal and state regulatory standards and programs. To this end, we hope Senator Johnston, as the primary sponsor of S.1802, and the members of the Senate Energy and Natural Resources Committee will give full consideration to our concerns and recommendations. We further offer our assistance in helping to forge legislation which will ensure a safe and healthy environment for our people.

OFFICE OF THE GOVERNOR
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BOISE 83720

CECIL D. ANDRUS
GOVERNOR

(208) 334-2100

April 30, 1990

The Honorable Quentin N. Burdick
Chairman
Senate Environment and Public Works Committee
511 Hart Building
Washington, DC 20510-3401

Dear Senator Burdick:

I am writing to enthusiastically support passage of S 1140. Over the years, federal agencies have engaged in imprudent and unsafe operations which have negatively impacted environmental health and safety at various federal facilities around the country. In particular, disposal of large quantities of waste have resulted in contamination of air, water and soil. These wastes, many of which contain hazardous and radioactive constituents, need to be appropriately cleaned up. To ensure this is done in a timely manner and to avoid similar problems in the future, I believe that states must have full authority to enforce applicable environmental laws with respect to federal facilities.

The need for this legislation is unmistakable. Federal agencies consistently maintain that states do not have the authority under the Resource Conservation and Recovery Act (RCRA) to utilize one of the most important environmental enforcement tools - imposition of civil penalties. Civil penalties are extremely effective in deterring violation of applicable environmental regulation. Moreover, the "unitary theory of the executive" espoused by the Department of Justice precludes any effective federal enforcement of environmental laws against federal facilities. Thus, not only are the states precluded from full enforcement of environmental laws at federal facilities, but even the federal government's own environmental enforcement arm, the Environmental Protection Agency, is prevented from meaningful enforcement.

I recently served as co-chairman of the NGA-NAAG Task Force on Federal Facilities. Our work culminated in a report issued earlier this year entitled "From Crisis to Commitment: Environmental Cleanup and Compliance at Federal Facilities." Two cornerstone recommendations of the report are the following:

> Congress should amend applicable federal laws to clearly waive federal sovereign immunity from the application and enforcement of federal and state environmental laws; and
>
> Congress should require that federal facilities conduct environmental management and compliance audits.

Both of these recommendations are embodied within the context of S 1140.

As a member of the Western Governors' Association, I supported WGA Resolution 89-007 which was adopted last year. This resolution asked Congress to clarify the waiver of sovereign immunity contained in RCRA to ensure that federal agencies comply with all federal and state laws, requirements and sanctions regarding management and disposal of solid and hazardous waste that already apply to states, local governments and the private sector.

Idaho is home to the Idaho National Engineering Laboratory (INEL) which is a U.S. Department of Energy (U.S. DOE) nuclear programs site. This site encompasses approximately 900 square miles in Idaho and has been in operation for over forty years. We in Idaho are very familiar with the environmental concerns posed by operations at the INEL, but I would point out that the DOE is not the only culprit when it comes to environmental degradation at federal facilities. Numerous areas on Bureau of Land Management and Forest Service lands, as well as Department of Defense facilities, also have considerable contamination problems and pose environmental risks in the state of Idaho. Operations at these federal facilities need independent oversight by the states. Full state enforcement authority will enhance future compliance with environmental laws at these facilities and will expedite remediation of the waste problems.

Without the ability to present the real threat of civil penalties, state agencies attempting to enforce RCRA compliance at federal facilities become little more than toothless tigers relying on bluster and growls. For example, at the Mountain Home Air Force Base in Idaho, deadlines in a signed compliance agreement were missed or ignored, and the state was powerless to collect stipulated penalties incurred as a result of the noncompliance. Perhaps the most troubling ramification of sovereign immunity is the chilling effect it has on the regulatory efforts of state agencies; because environmental regulations and signed compliance agreements cannot be enforced, state agencies begin to apply their resources where they will be most effective and avoid the dead end drain of compliance efforts at federal facilities.

Currently, oversight and monitoring agreements are being negotiated between certain federal agencies and states. However, these agreements cannot take the place of law. There can be no credible regulatory oversight of federal facilities so long as the regulated entity can claim immunity from enforcement actions. It is essential that S 1140 be enacted to assure long-term continuity of regulatory enforcement at federal facilities. S 1140 does this by clarifying that federal facilities are subject to the same enforcement procedures under RCRA as any entity. Essentially, S 1140 puts the federal government on a level playing field with all American citizens and businesses that are subject to the requirements of RCRA. S 1140 is sorely needed and it is fair. I urge your passage of this legislation.

Sincerely,

Cecil D. Andrus

Cecil D. Andrus
Governor

CDA:jci
cc: Senator Mitchell (ME)
Senator Baucus (MT)
Senator Lautenberg (NJ)
a/f

NEIL GOLDSCHMIDT
GOVERNOR

1859

OFFICE OF THE GOVERNOR
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SALEM, OREGON 97310-0370
TELEPHONE: 378-3111

May 1, 1990

Senator Quentin Burdick
Chairman, Senate Environment &
Public Works Committee
SD 458 Dirksen Senate Office Building
Washington, DC 20510-6175

Dear Senator Burdick:

This letter is to urge your support for Senate Bill S 1140. That bill is very important to assure that federal facilities will be subject to the same environmental laws as private corporations and state and local governments. The bill is particularly important to our efforts to clean up the nuclear weapons waste facility at Hanford and the Umatilla Army Depot in Oregon.

I applaud your leadership in moving this bill. I hope you can take quick action on this. This bill is consistent with the position I have taken with the other western Governors and the Western Governors' Association, as well as nine other governors nationwide that have called for the cleanup of US Department of Energy facilities. I strongly support passage of this bill.

Sincerely,

Neil Goldschmidt
Governor

cc: Senator George G. Mitchell
SR-176 Rayburn Senate Bldg.
Washington, DC 20510

Senator Max Baucus
SH-706 HSOB
Washington, DC 20510

Senator Frank R. Lautenberg
SH-717 HSOB
Washington, DC 20510

Senator Mark Hatfield
SH-711 HSOB
Washington, DC 20510

Senator Bob Packwood
SR-259 RSOB
Washington, DC 20510

Phil Shimer
Western Governors' Association
600 17th Street, Suite 1705
Denver, CO 80202

State of Rhode Island and Providence Plantations
EXECUTIVE CHAMBER, PROVIDENCE

Edward D. DiPrete
Governor

May 24, 1990

The Honorable Quentin N. Burdick
United States Senate
SH511 Hart Senate Office Building
Washington, DC 20510-3401

Dear Senator Burdick:

I am writing to express my support for S.1140, a bill that would significantly enhance the state's authority to ensure that federal facilities comply with state hazardous waste laws.

In 1984 Congress amended the Resource Conservation and Recovery Act (RCRA) with the clear intent of making federal agencies subject to the same standards of compliance and enforcement as non-federal parties. This bill clarifies the existing waiver of sovereign immunity in Section 6001 of the RCRA, 42 U.S.C. Section 6901, and makes federal facilities subject to state administrative orders, fines, and penalties.

S.1140 clarifies the original intent of the 1984 amendment of RCRA. I urge the Committee's support for speedy adoption of S.1140 without amendments.

Sincerely,

Edward D. DiPrete

Edward D. DiPrete
Governor

cc: Tom Curtis, National Governors' Association
Sally T. Dowling, Director, Governor's Policy Office
Anna F. Prager, Analyst, Governor's Policy Office

1896

STATE OF UTAH
OFFICE OF THE GOVERNOR
SALT LAKE CITY
84114

NORMAN H. BANGERTER
GOVERNOR

June 11, 1990

To the Senate Committee on Environment
and Public Works
Dirksen Senate Building
First St. & Constitution Ave., N.E.
Room 458
Washington, D.C. 20510

Dear Senators:

This letter is sent to you urging adoption of S. 1140 which is scheduled for vote before the Senate Environment and Public Works Committee on June 12, 1990. This bill would make it clear that federal facilities are subject to the same substantive enforcement provisions for violations of state and federal hazardous waste laws that apply to state and local governments, and private industries.

Historically, the State of Utah has issued administrative notices of violation and orders to numerous federal facilities in Utah because of violations of federal and state hazardous waste laws. These facilities include Hill Air Force Base, Tooele Army Depot North, Tooele Army Depot South, Dugway Proving Grounds, and the Utah Test and Training Range.

Penalties are an essential deterrent factor against future violations and will help to obtain compliance with the law. It is clear from past practices in Utah that administrative notice and order authority is not sufficient to insure that the citizens of the state are protected in management of hazardous wastes at federal facilities.

The State of Utah has received a delegation of authority from the Environmental Protection Agency to administer the federal Resource Conservation and Recovery Act program in Utah. Passage of S. 1140 would provide an essential enforcement tool to carry out that delegation. The State of Utah operates under an EPA approved penalty policy and applies that policy consistently and fairly to both private and public entities in Utah.

Senate Committee on Environment and Public Works
June 11, 1990
page 2

We urge your vote in support of S. 1140, which will help Utah address the serious environmental problems created by actions of federal facilities in this state.

Sincerely,

Norman H Bangerter
Norman H. Bangerter
Governor

R. Paul Van Dam
R. Paul Van Dam
Attorney General

STATEMENT OF SENATOR PETE WILSON AT HEARING ON S. 1140

REGARDING CLEANUPS AT FEDERAL FACILITIES

Mr. Chairman, I want to thank you for convening this hearing to consider one of the most serious environmental contamination problems now facing our country -- that of toxic contamination at Federal facilities.

I am particularly pleased to be here today to follow up on a concern that I raised last summer during the debate on the Defense Authorization bill as to the pace at which our military installations are proceeding with the cleanup process. During the debate last summer, Senators Chafee, Baucus, and Lautenberg assured me that the Committee would convene hearings to address the Federal facility cleanup issue.

I am pleased that the Committee has now assembled the Federal facility experts so that we can get on with this important business.

This is a very serious problem for many reasons. At a number of U.S. military installations around the world, a long history of careless maintenance practices has caused serious groundwater contamination.

At the same time, many of the DOE facilities have also experienced severe problems in the storage and treatment of hazardous wastes.

The projected costs of remedying these problems are staggering: one study by the General Accounting Office has suggested that the cost of cleaning up Energy Department sites could reach $120 billion dollars. For its part, the Department of Defense has estimated that the costs of cleaning up contaminated military installations will reach at least $15 billion dollars.

But, Mr. Chairman, while the cost is high, to delay merely increases the cost and endangers the health of our citizens. That is why I support S. 1140, and urge this Committee to go further and consider additional measures to accelerate the pace of the cleanups.

S. 1140 makes clear that Federal facilities cannot cloak themselves under sovereign claims of immunity to defeat the imposition of State or local fines for violations of hazardous and solid waste laws.

Once this bill is enacted into law, States, localities, and citizens will be able to obtain penalties from Federal facilities that persist in violating their obligations to remedy their environmental contamination problems.

The importance of S. 1140 to the cleanup effort cannot be over-emphasized. It provides States and citizens with an additional weapon in their efforts to speed up the cleanup effort at Federal facilities.

Under current law, the Federal government has been successful in California and in other States contesting the imposition of fines for violations of RCRA by invoking sovereign immunity as a defense. As a result, Federal facilities will be more willing to negotiate reasonable cleanup schedules.

Mr. Chairman, I understand that the Administration has not agreed to every aspect of this bill. But I am confident that common ground can be reached on the essential need to require Federal facilities to move more quickly with cleanups and compliance.

The sad fact is that our Federal facilities have had a spotty history with respect to environmental contamination. In my own State of California, there were at last count 20 military installations that had been placed on the National Priority List for cleanup under Superfund.

This list constitutes the catalogue of the most contaminated sites in the country. And this list does not begin to cover those military bases that might be deemed in violation of the cleanup requirements imposed by RCRA.

Mr. Chairman, it is clear that we must act aggressively to require these facilities to move quickly to address their contamination problems.

There is strong frustration on the part of communities whose drinking water supplies have been adversely affected by groundwater contamination, and who have been fighting -- sometimes for years -- to force the military to clean up the problem. Likewise, there is a growing sense of frustration at the State level at the delays that attend their efforts to force compliance with the hazardous waste laws.

Mr. Chairman, the pollution at these sites often contaminates underground aquifers via abandoned or poorly constructed wells. The cleanup of these sites cannot wait until tomorrow. The longer these contamination sites go unmitigated the greater likelihood that they will spoil limited fresh water sources.

As California enters its fourth year of drought conditions, water resources become even more precious. The state of California cannot have its fresh water aquifers imperiled by contamination sites.

Therefore, I commend the efforts of the Committee to enact legislation that would invigorate the cleanup effort at these facilities.

Mr. Chairman, we must address this problem on a number of fronts. S. 1140 embodies a good initiative under the Resource Conservation and recovery Act. But it addresses only a small piece of the puzzle.

I invite the Committee to consider the proposal I put forward last August on the Senate floor requiring Federal agencies to enter into cleanup agreements under the Superfund statute once their facilities have been proposed to be listed on the National Priority List.

As I emphasized during the debate last August, it is unacceptable for the Department of Defense to be delaying these interagency agreements for 4 to 5 years after their installations are placed on the priority cleanup list.

Several examples of the problem exist in my own State.

Norton Air Force Base was proposed for listing on the National Priorities List in October of 1984. But the interagency agreement under Superfund was not concluded until June of 1989.

Mather Air Force Base also was proposed for inclusion on the National Priorities List of October 1984. That base did not conclude its interagency agreement until July of 1989.

The Naval Air Station at Moffutt Field was proposed for inclusion on the National Priorities List in April 1985. Yet that facility had not concluded any sort of interagency agreement as of last summer -- and I am advised none has been concluded to date.

Similarly unacceptable delays can be found at other bases around the country. In fact, as I am sure the members of this Committee are well aware, military bases have been placed on the Superfund National Priorities List in Florida, Idaho, Maine, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, and Wyoming.

I strongly urge increased funding for the Defense Environmental Restoration Account from its current level of $500 million to a level of $1 billion. I am hopeful that my friends on the Armed Services Committee will agree that such increased funding is important if we hope to speed up the process by which these contamination problems are resolved.

I am also strongly in favor of an increase in funding for EPA positions designed to draft and implement interagency agreements. It does little good to have a military base proposed for listing on the NPL, only to have the actual listing delayed for a year or more due to lack of staffing.

Therefore, Mr. Chairman, I urge the Committee to include as part of S. 1140 the language I offered last summer as an amendment to the Defense Authorization bill.

This language would amend Section 120 of the Superfund statute to require military installations to enter into interagency agreements with States and localities to initiate cleanup of sites proposed for listing on the National Priorities List within one year of being proposed for that List. This would be a significant improvement on current timetables.

Mr. Chairman, thank you for the opportunity to appear today, and I commend you for assembling the key representatives of our Federal facility cleanup effort for this hearing. The time has arrived for the appropriate executive agencies and the Congress to pursue a coherent strategy for the expeditious cleanup of U.S. government facilities.

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

TESTIMONY OF JAMES E. TIERNEY
ATTORNEY GENERAL
STATE OF MAINE
BEFORE THE COMMITTEE ON ENVIRONMENTAL AND PUBLIC WORKS
CONCERNING ENVIRONMENTAL COMPLIANCE
BY FEDERAL FACILITIES
S. 1140

Good morning, my name is James E. Tierney. I am Attorney General of the State of Maine. I am here today to testify about Maine's experience in enforcing its hazardous waste laws at the three major Department of Defense facilities located within the State. I will also review the long history of the battle to achieve environmental compliance at federal facilities and comment on the specific bills being considered by this Committee.

Environmental Compliance at Federal Facilities in Maine

When most people think of Maine, they think of the ocean. Maine's long coastline and many harbors have played a vital role in our history and have made shipbuilding an important industry from the beginning. Maine has been building vessels for the Navy -- first the British Navy and then the American Navy -- since 1690 when a 54-gun warship was built for the Royal Navy at what is now the Portsmouth Naval Shipyard.

Today, there are two major shipyards in the State that build and overhaul ships for the Navy. Bath Iron Works (BIW), located on the Kennebec River in the City of Bath, builds primarily destroyers, frigates and cruisers. At its Portland drydock, BIW does repair and overhaul work on naval vessels. BIW is a private company which often must compete against Navy-operated shipyards for its overhaul contracts.

Seventy-five miles to the south in Kittery, Maine, is the Portsmouth Naval Shipyard. Its primary mission is to overhaul and maintain nuclear submarines. It is an agency of the federal govenment. Both shipyards employ thousands of workers. Both play an important role in building and maintaining the vessels needed by the United States Navy. Both generate hazardous waste.

As Attorney General I have a duty to enforce Maine's hazardous waste laws as vigorously against federal agencies as against private companies. My concern for even-handed enforcement is more than just a philosophical concern. BIW must compete for Navy contracts against Navy-operated shipyards. Although it does not compete directly against Portsmouth because Portsmouth specializes in submarines, it does compete against Navy shipyards in other states, which, our experience tells us, must have many of the same environmental problems that Portsmouth does. We also know that those Navy competitors of BIW do not pay state hazardous waste fees and do not pay penalties for their past violations. We know this, of course, because refusal to pay has been the consistent policy of the Department of Defense and the Department of Justice. Allowing the Navy shipyards to go on violating hazardous waste laws, not paying fees and not paying penalties, places private shipyards like BIW at an unfair competitive disadvantage.

It is, therefore, important to examine the major difference between Maine's two major shipyards: their history of compliance with Maine's hazardous waste laws. The Maine Hazardous Waste, Septage and Solid Waste Management Act, 38 M.R.S.A. §§ 1301-1310-B, and Maine's Hazardous Waste Rules impose facility standards, inspection, planning and record-keeping requirements on generators and facility operator which, if followed, will prevent the release of hazardous wastes into the environment. Maine's Hazardous Waste Fund 38 M.R.S.A. §§ 1319-B-1319-K requires the payment of fees which help support the hazardous waste regulatory program.

Bath Iron Works, the private company, has been generally responsible and responsive in complying with hazardous waste requirements. BIW has consistently paid to the Hazardous Waste Fund the generator and annual fees it owes. Inspections of BIW, even some of the earliest inspections, showed violations that are generally fewer and less severe than those found at Portsmouth. When compliance problems have arisen, BIW has generally resolved them promptly by reaching an administrative consent decree with the Department of Environmental Protection (DEP) and paying its penalties. Frequently, BIW has been able to resolve compliance issues and reach an agreement with DEP, which includes a penalty, within three months of the violation.

The Portsmouth Naval Shipyard's compliance history is a very different story. With the exception of one year when, the Navy apparently forgot that it was the immune sovereign, Portsmouth has refused to pay its annual and generator fees. In addition, inspections have shown more numerous and more serious violations than those at BIW and these violations have not been quickly corrected. Even the simplest violations seem to take years to resolve and many violations, such as failure to keep lids on drums of hazardous waste and failure to properly label them, have been found in virtually every inspection since the first major inspection in 1981. Consistent with this history of unresponsiveness and apparent lack of concern, Portsmouth has not yet even entered into any settlement with the Department of Environmental Protection.

Portsmouth's hazardous waste problems go beyond these current violations of Maine's hazardous waste laws. The shipyard has inactive landfill sites that contain substantial amounts of hazardous waste as well as numerous areas of heavily contaminated soil and ground water. The biggest waste site at the shipyard is the so-called Jamaica Island Landfill, an area of 25 acres in what used to be tidal flats. From the 1940's until 1978, the Navy filled in these tidal flats with a variety of wastes containing many hazardous substances. In 1978 it covered the old landfill with dredge spoils which were contaminated with heavy metals and PCB's. Because the Jamaica Island Landfill is located in a former tidal flat, it is flushed by the tides twice a day. The only good news about the hazardous waste sites at the shipyard is that they do not directly threaten any drinking water supplies because the shipyard is located on an island in the mouth of the Piscataqua River and is surrounded by salt water. We do know, however, that hazardous substances from the landfill have migrated into the estuary surrounding the shipyard. Our fisheries are therefore endangered.

In June of 1986, the State of Maine, frustrated with the long history of nonresponse, sued the Department of the Navy and the Department of Defense seeking penalties for past violations of Maine's hazardous waste laws and rules and an injunction requiring the shipyard to comply in the future. This suit was crucial to the credibility of our hazardous waste enforcement program for a number of reasons. The Portsmouth Naval Shipyard is the third largest generator in the State and has the longest and most persistent history of noncompliance. We could not ignore it. But more than that, we believed that simple equity to private industry in our State, such as BIW, required us to bring this action and pursue it to the end. It was imperative that we require the same level of responsibility and compliance from the federal government that we require from the private sector. It was important that the Portsmouth Naval Shipyard face the same consequences for its past violations that any private company would face. And it was important to protect the environment in Kittery as vigorously as that in Bath. Portsmouth has not seriously contested the facts or legal citations contained in the State's Complaint. Indeed, the issue has never been whether Portsmouth violated the law. Instead, Portsmouth asserted that sovereign immunity protected it from suit by the State.

Maine has won a very important initial victory in its enforcement case against Portsmouth. The Federal Magistrate and the Federal Judge who have heard Maine's case have both rejected the Navy's sovereign immunity defense. In his opinion, U. S. District Court Judge Carter held that the Navy and the Department of Defense were subject to Maine's civil penalties and fees just like any other party. I expect that the amount of the civil penalties and fees for which the Navy is liable to Maine will soon be resolved in a consent agreement but even then the Navy will appeal and reargue its sovereign immunity defense to the First Circuit Court of Appeals.

As you probably know, the U. S. District Court in Maine was the first court that has held the federal government liable for hazardous waste penalties. I am proud of that decision. One other federal court has now reached a similar decision but some courts have reached the opposite conclusion. The Department of Defense has taken the position that unless and until the United States Supreme Court has ruled upon the issue, its sovereign immunity defense remains. Thus, the adverse judicial decisions interpreting § 6001 of the Resource Conservation and Recovery Act as not waiving sovereign immunity highlight the importance of the hearings you are holding today. By acting now, Congress can eliminate the uncertainties created by conflicting court decisions and prevent the Justice Department from asserting defenses that only delay the day when federal facilities must comply.

Because of Maine's concern about the threat that the inactive hazardous waste sites pose to its coastal resources, we filed a second suit against the Navy in September of 1986. Since we filed this suit, it has appeared that EPA is willing to take the lead in devising a remedy for the hazardous waste sites at the shipyard and has issued a corrective action permit under RCRA with the State's technical assistance which would require the Navy to implement a remedial plan. Because it appears that EPA's corrective action permit will provide the quickest solution to these waste sites, all parties to the litigation have agreed to make the corrective action permit the vehicle for remedying the site.

The two other major Department of Defense facilities in Maine are the Brunswick Naval Air Station and Loring Air Force Base. Both of them have had enforcement problems similar to those at Portsmouth. We have been able to negotiate resolutions of these current enforcement problems but only by agreeing that liability for penalties and fees will be determined by the outcome of the Portsmouth case. After putting that issue aside, it was possible to agree on specific measures to correct past violations. Both Brunswick and Loring have old hazardous waste site problems as well. At Brunswick the Navy has so far refused to enter a clean up agreement which is enforceable by the State or which recognizes the Navy's duty to comply with State law. Negotiations regarding the Loring clean up are just beginning but it is the State's understanding that the Air Force's position will be very similar to that expressed by the Navy.

Maine's problems with hazardous waste generated at and by federal facilities is by no means limited to Loring, Brunswick, and Portsmouth. For example, the State has spent $500,000 to clean up hazardous wastes at the Harry Smith site located in Meddybemps, Maine, and has made demand upon the Department of Defense for reimbursement but no reimbursement has been received.

At the Charleston Correctional Institute hazardous waste disposed of by the Department of Defense in underground tanks had to be removed by Maine when the Department of Defense failed to do so. The State has spent tens of thousands of dollars to drain and dispose of hazardous wastes generated when this facility was a military microwave station. Again, the Department of Defense has to date failed to reimburse the State or to remove all contaminated soil.

The final example upon which I will report today involves hazardous waste generated at Portsmouth and disposed of at the Hooper Sands site in South Berwick, Maine. Here again the State has already expended substantial sums with more expenditures to come and yet has received not one cent from the Department of Defense by way of reimbursement.

I would like to conclude my discussion of Maine's experience with the Department of Defense facilities with some observations about where the responsibility for poor environmental compliance lies. The base commanders at Portsmouth, Brunswick, and Loring have generally been responsible and eager to resolve their hazardous waste problems with the State. Indeed, my staff and the staff of the Department of Environmental Protection feel that if the commanders had full authority to resolve their environmental problems, our enforcement actions might not have been necessary and we would probably not be here talking to you today. But the base commanders, who are the ones who care the most about living responsibly within their communities, do not have adequate authority. They are limited by the legal staff of the Department of Defense which takes its cues from the Justice Department and severely limits the concessions that can be made in settling a hazardous waste matter. The Pentagon legal staff requires base commanders to follow the DOD policy of asserting sovereign immunity and opposing penalties and fees.

The base commanders are also severely limited by the fact that management of hazardous waste facilities on their bases is actually done by the Defense Reutilization and Marketing Office (DRMO) which is part of the Defense Logistics Agency (DLA). DLA is an independent agency within the Department of Defense. DLA, and not the base commander, has direct line authority over DRMO and the actual management of hazardous waste facilities at Navy and Air Force bases. Although base commanders have some authority over the DRMO facilities located on their own bases, they do not have the kind of real managerial control necessary to ensure compliance. Even if a base commander is committed to a high level of compliance with hazardous waste laws, he may not have sufficient authority to guarantee that compliance. It is our judgment that DLA and DRMO are at the heart of the hazardous waste compliance problems of the Defense Department. Yet to the best of our knowledge, they have escaped the attention they deserve from congressional committees and EPA. We urge this Committee, if it has an opportunity, to take a hard look at this part of the problem.

History of the Fight to Achieve Environmental Compliance at Federal Facilities

Today you will hear about many, very serious environmental problems at federal facilities across the country. No matter how outrageous these problems seem today, they are even more outrageous when you know the long history of the battle to achieve environmental compliance at federal facilities. This battle has largely been one between Congress and the states on the one hand and the federal facilities and the Justice Department on the other.

The conflict began eighteen years ago in 1970 when Congress, disappointed with poor voluntary compliance under prior laws, adopted the first federal facilities provision in the Clean Air Act and made compliance mandatory for the first time. Although the federal facilities and the Justice Department conceded that that first provision subjected them to the substantive requirements of state and federal air laws, they began a trench warfare against effective enforcement that continues to this day. Throughout the history of this battle, the Department of Justice has asserted niggardly, narrow defenses to shield federal facilities from the consequences of their environmental irresponsibility. It is disturbing indeed to consider the amount of added environmental damage that has been done in the last eighteen years while federal facilities have avoided their environmental responsibility and taken advantage of every loophole and evasive tactic that the creativity of the Department of Justice could devise.

In 1976 the battle over effective enforcement of environmental laws at federal facilities came to a head. Several states insisted that federal facilities were required to get air and water permits from the states. The states pointed out that permits were a critical part of effective enforcement of any environmental program. The federal facilities, however, maintained that they would comply with substantive requirements of the law, but not procedural or enforcement requirements. EPA sided with the federal facilities and the battle was taken to court. All but one Circuit Court of Appeals held that the federal facilities were not required to get permits and the cases went to the Supreme Court. The Supreme Court held in June of 1976 that the federal facilities were not required to have permits.

While this litigation was pending, Congress was considering the Resource Conservation and Recovery Act (RCRA) and the Clean Air Act Amendments. During the summer of 1976, it drafted the language that became the federal facilities provision of RCRA and the comparable provision in the Clean Air Act. Congress was outraged at what it considered to be a gross misreading of its intent by the courts. It expressed that outrage in very clear terms. The House of Representatives Committee Report on the Clean Air Act Amendments described the original intent in passing § 118 of that Act:

> "Adoption of section 118 of the Act was intended to remove all legal barriers to full Federal compliance, except as exemption authority was expressly provided in that section. The historic defense of sovereign immunity was waived by Congress. Consent to be sued was provided.
>
> Constitutional arguments regarding the supremacy clause no longer permitted a refuge or unwilling or tardy Federal agencies. Section 118 of the 1970 Clean Air Act Amendments (Public Law 91-604) established, as a matter of Federal law, the

> duty of Federal facilities to abide by all State and local emission control requirements (including of necessity those procedural requirements and sanctions incidental to implementation and enforcement of the substantive requirements). Furthermore, under § 110(d) of the Act, as amended, approved State and local requirements became federal requirements which the Environmental Protection Agency was to enforce if the State failed to do so.
>
> Section 118 expressed Congress' intent that the State and local requirements not be deemed invalid because they contradicted orders of the TVA, the Secretary of Army or Navy; rather, any action of these other federal agencies refusing or failing to comply with State and local requirements was to be deemed invalid as a violation of section 118 of the Act.
>
> Nor was the Federal enclave theory of exclusion from State jurisdiction to be available to evade the duty of compliance. State and local air pollution requirements were presumed to apply to Federal facilities, to the same extent as privately-owned facilities, unless there was an express inclusion in the State or local provision for federal facilities.
>
> Section 118 of the Clean Air Act, as amended by Public Law 91-604, was intended to settle these matters once and for all." H.R. Rep. No. 1175, 94th Cong., 2d Sess., 170-171 (1976); 7 Legislative History of the Clean Air Act Amendments of 1977, 6719-6720. (A longer excerpt from the report is attached).

Senator Edmund S. Muskie of Maine, who was the principal architect of many of this country's environmental laws, was the floor manager of the Clean Air Act Amendments in 1976 and 1977. His comments on the federal facilities issue make it clear that states were to have full enforcement authority over federal agencies. In response to a question from Senator Strom Thurmond about whether states could enforce their laws even against combat and combat-related sources, Senator Muskie said:

> "In answer to the Senator's question

> concerning State and local enforcement of their regulations between enactment of this amendment and issuance of Presidential exemptions, under this amendment, State and local governments are authorized to enforce substantive and procedural standards and procedural requirements for military combat and combat-related sources." 123 Cong. Rec. 18,513 (1977); 3 Legislative History of the Clean Air Act Amendments of 1977, 1143.

Despite this clear expression by Congress that federal agencies are subject to the same liability as every other person, the Justice Department has managed to convince a number of courts that congressional intent on this matter is ambiguous. In defending federal facilities cases, Justice will assert any defense no matter how many times or how explicitly it has been rejected by Congress. The Justice Department shows no concern for any law or principle beyond the narrow self-centered interest of their agency clients. There is a lesson that we can draw from this history and that is the importance of good legislative history for each piece of legislation in this area.

S. 1140. Application of Certain Provisions to Federal Facilities.

This bill is most relevant and helpful to Maine. Our case against the Navy turned on the interpretation of § 6001. Although we won the first round of that case when the U. S. District Court for the District of Maine held that § 6001 does subject the federal government to civil penalties and fees, there is no guarantee that its decision will be upheld on appeal.

This bill makes the waiver of immunity so clear that it is hard to imagine that any court could misinterpret it. However, the legislative history should clearly state that these amendments to § 6001 simply clarify the original intent of Congress in passing § 6001 and that, therefore, the waiver of immunity applies retroactively to any violation of federal, state or local law which arose after the effective date of the original § 6001. If you do not include such a statement in the history, the Department of Justice will certainly argue that these amendments show that the original § 6001 did not waive immunity and your amendments might be a ground for reversing Maine's, Ohio's, and Colorado's victories on appeal. The history should also specifically reject all the court decisions that have held the federal government not liable for penalties. It would also be useful to list and reject every defense currently used by the Justice Department.

Maine's experience litigating against the Navy points to two more amendments to § 6001 that are appropriate. The Justice Department has argued that the parenthetical phrase in the first sentence, which begins, "including any requirement for permits . . .", is an exclusive list of requirements. Although this argument ignores common sense and the normal English meaning of "including", it would be useful if Congress inserted "but not limited to" after "including" as it has in the second sentence.

If the federal government, which in Maine is the third largest generator, does not pay its fees, the shortfall will have to be made up either by private generators in the form of higher fees or the taxpayers by the use of more general funds to support the hazardous waste program. The federal government should be made to bear its fair share of the cost of the hazardous waste program in the same manner as private industry.

CONCLUSION

I thank the Committee for this opportunity to testify on a topic that is of great importance to Maine and every other state. We share the frustration of Congress at the executive branch's refusal to abide by the law and commend this Committee for its evident determination to end that lawlessness. If Congress adopts the bill before this Committee, EPA and the states will be able to enforce hazardous waste laws effectively against federal facilities. Without this or similar legislation, EPA will continue to be barred from taking any enforcement action and states will continue to be hampered by protracted litigation and the possibility of narrow judicial interpretations of the federal facilities provision of RCRA.

Attorney General
Anthony J. Celebrezze, Jr.

WRITTEN TESTIMONY

OF

JACK A. VAN KLEY
CHIEF LITIGATOR
ENVIRONMENTAL ENFORCEMENT SECTION

OHIO OFFICE OF THE ATTORNEY GENERAL

BEFORE THE

U.S. SENATE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

DIRKSEN SENATE OFFICE BUILDING

ROOM 406

WASHINGTON, D.C.

9:30 A.M.

WEDNESDAY, MAY 2, 1990

State Office Tower / 30 East Broad Street / Columbus, Ohio 43266-0410
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Mr. Chairman, members of the Committee, I am Jack Van Kley, Chief Litigator of the Environmental Enforcement Section of the Ohio Attorney General's Office. I am representing Attorney General Anthony J. Celebrezze, Jr., who could not testify today due to prior commitments, and the National Association of Attorneys General. I appreciate the opportunity to be with you today and share my thoughts about S. 1140, a bill to ensure that federal facilities comply with the hazardous waste laws. I ask that both my testimony and the prepared statement I have submitted be made a part of the official record of this Committee.

THE FUTILITY OF ENVIRONMENTAL SAFEGUARDS WITHOUT SANCTIONS

The progress made in the protection of our environment over the last twenty years has taught us the importance of strong environmental laws which are administered and enforced by a strong and independent regulatory agency. Experience has proven that the vigilance of an independent regulator is an indispensable ingredient of an effective environmental protection program. The private sector as well as state and local governments have learned to live with, and adjust to, an independent assessment of their compliance with the statutes passed by the Congress and the states. Those that do not comply with our environmental laws are faced with the prospect of strong enforcement action by the regulatory agency, including the assessment of fines and/or penalties commensurate with the degree of wrongdoing.

Since the early 1970's, Congress has recognized that pollution control programs are ineffectual without the use of sanctions to punish those who choose not to comply. For example, during its consideration of the Federal Water Pollution Control Act Amendments ("FWPCA") of 1972, the Senate Public Works Committee observed that the federal water pollution laws in place before 1972 had failed miserably in part due to the lack of sanctions imposed for noncompliance with them. As the Committee observed:

> The Committee further recognizes that sanctions under existing law have not been sufficient to encourage compliance with the provisions of Federal Water Pollution Control Act.... The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct. Abatement orders, penalty provisions, and rigid access to the Federal District Court should accomplish the objective of compliance.

S. Rep. No. 414, 92d Cong., 2d Sess. 64, reprinted in 1972 U.S. Code Cong. & Ad. News at 3730-31.

As a result of this need for enforcement, Congress provided both civil and criminal penalties to enforce the water act. In fact, Congress felt so strongly about the necessity for these sanctions that it required the states to use both civil and criminal penalties as a pre-condition for obtaining federal approval of their water pollution programs. 33 U.S.C. 1342(b)(7).

As explained by the above quotation, Congress has previously recognized that pollution abatement is futile unless the polluters know they can be, and will be, punished in a "swift and direct" fashion if they disregard the law. If violators cannot be penalized for their past misconduct, they have little incentive to comply with the law until a court orders them to comply. In effect, until an injunction filed against him, a violator has a "free" period of noncompliance during which he can violate the law with impunity. Only if faced with sanctions for noncompliance will many polluters voluntarily comply without forcing the government to sue them first.

Without sanctions to punish past violations, there exists no way to prevent the violations from occurring. The courts can only stop the violations once they have started and order a belated, and usually very expensive, cleanup to repair the damage. Unfortunately, the damage to the environment and the injury to the health of nearby residents is sometimes irreparable. In short, the only effective means to protect the public from harm is to deter all persons, including both private and governmental entities, from handling their waste in an irresponsible fashion. An after-the-fact cleanup occurring only after the damage has already been done is highly unsatisfactory.

At the same time that Congress was realizing the indispensable role of sanctions in halting pollution, it also found that a major portion of this pollution was originating from federal facilities. The Senate discovered that federal agencies were setting an embarrassing example for private industry, noting:

> Evidence reviewed in hearings disclosed many incidents of flagrant violations of air and water pollution requirements by Federal facilities and activities. Lack of Federal leadership has been detrimental to the water pollution control effort. The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute.

S. Rep. No. 414, 92d Cong., 2d Sess. 67, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 3733-34.

Similar problems were detected by the House:

> The Committee, after hearing of numerous examples of flagrant violation of pollution controls is determined that the Federal facilities shall be a model for nation....

H.R. Rep. No. 911, 92d Cong., 2d Sess. 118 (1972).

Due to its dissatisfaction with the noncompliance record of federal facilities, Congress took steps to ensure that federal facilities complied with the pollution laws just like other persons. To make sure that federal facilities complied in the same manner as everyone else, the FWPCA and the Clean Air Act subjected federal facilities to the same "requirements" as private entities.

However, federal agencies refused to obey these pollution laws, choosing to read the term "requirements" in these statutes in a restrictive fashion. Instead of complying with these laws, federal agencies, encouraged by the Department of

Justice, filed lawsuits against states which were trying to implement their pollution laws by enforcing permit requirements. The Supreme Court ruled in favor of the federal agencies under both the FWPCA and the Clean Air Act. Hancock v. Train, 426 U.S. 167 (1976); EPA v. California, 426 U.S. 200 (1976). The Court held that federal facilities had to comply only with "substantive" requirements and were not subject to "enforcement mechanisms" such as permits "to enforce" those substantive duties. Hancock, 426 U.S. at 183. The Supreme Court and the Court of Appeals in Hancock also distinguished "substantive" requirements from "procedural" requirements, the latter term being used to describe enforcement mechanisms. 426 U.S. at 182. The Supreme Court emphasized that the statute would have expressly stated that federal facilities were subject to "all" requirements if Congress had meant to allow the use of enforcement mechanisms against federal facilities. 426 U.S. at 182.

Of course, since the Supreme Court prohibited the states from using enforcement mechanisms to compel federal facility compliance with the pollution laws, the federal facilities knew they could not be punished for violating the substantive requirements of law. Therefore, they chose not to comply. Rather than providing a model for private industry, federal facilities by the late 1970's were well behind the private sector in pollution control. While considering the 1977 amendments to the Clean Air Act, the House found that many federal personnel had been "cynical and suspicious" about, and had "chosen" not to initiate plans and budget requests for, pollution control. Federal agencies had been "laggard" and had "obstinately refused" to comply. H.R. Rep. 294, 95th Cong., 1st Sess. 198-99 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 1277-78. It had become obvious that, unless federal facilities could be punished for violating these laws, they would continue to do so.

Reacting sharply to the uncooperative response by federal agencies and the Supreme Court's misinterpretation of prior Congressional intent, Congress amended both the FWPCA and the Clean Air Act to subject federal facilities to "all" requirements, both "substantive" and "procedural." Because the Supreme Court had excluded enforcement mechanisms (procedural requirements) from the waivers due to the absence of the term "all", Congress deliberately overrode the Court's decisions by not only inserting the term "all" into the waiver, but by also expressly authorizing the use of all "procedural requirements" (i.e., enforcement mechanisms) as well. These terms were inserted not only in the water and air act waivers, but were also used in the Resource Conservation and Recovery Act ("RCRA") which had been enacted in 1976.

THE FAILURE OF RCRA AT FEDERAL FACILITIES

The use of meaningful sanctions to prevent pollution, rather than the mere after-the-fact use of injunctive relief to clean up illegally released wastes, takes on added significance in the context of the hazardous wastes regulated by RCRA. Citing fifty-nine (59) examples of groundwater pollution, fish kills, wildlife and livestock kills, and human poisonings to illustrate the dangers caused by mismanaged hazardous wastes, Congress has found that these wastes can "blind, cripple or kill ... defoliate the environment, contaminate drinking water supplies and enter the food chain." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 11, 17-23 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News at 6249 6254-61. Given the hazardous nature of these wastes, sanctions must be readily available to punish anyone who ignores hazardous waste safety requirements and to thus encourage each person to obey the law before others are harmed.

To protect the public from the dangers of hazardous waste, RCRA set forth stringent sanctions to deter mismanagement of the waste. As with the other pollution laws, RCRA in 1976 endorsed sanctions to prevent illegal government pollution by making federal facilities subject to all requirements, both substantive and procedural. In 1984, Congress added waiver language to the citizen suit section of the Act to provide additional sanctions against federal facilities. This Committee affirmed the use of sanctions to encourage federal obedience to the hazardous waste laws, by stating:

> Either a noncomplying agency ... [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of section 7002. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, including the United States...".

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). (Emphasis added).

During the consideration of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Congress reaffirmed the RCRA waiver of sovereign immunity for sanctions by stating:

> This clarifies that CERCLA, together with RCRA, requires Federal facilities to comply with all Federal, State and local requirements, procedural and substantive, including fees and penalties....

Conf. Rep. No. 962, 99th Cong., 2d Sess. 242 (1986), reprinted in 1986 U.S. Code Cong. & Ad. News at 3335. (Emphasis added).

By clearly allowing federal agencies to be punished for illegal hazardous waste activities, Congress hoped to encourage federal agencies "to provide national leadership" in dealing with hazardous waste problems. S. Rep. No. 988, 94th Cong., 2d Sess. 24 (1976). Regrettably, this policy has been a dismal failure.

Although Congress has quite clearly expressed its intent to penalize federal facilities when they ignore the hazardous waste laws, the lawyers employed by the federal agencies have convinced them that the waiver is not clear enough to stand up in court. Although the federal agencies freely acknowledge that they are subject to injunctive relief to stop their violations, they have insisted that they cannot be punished for their recalcitrance by fines and penalties. The federal agencies have taken the position that they, and they alone, determine whether they have complied with applicable environmental standards. While federal agencies, under pressure from Congress, the states, and citizen groups, now pay lip service to some of the hazardous waste laws, their compliance with those laws falls far short of an acceptable standard. With the support of the Justice Department, federal agencies have argued that if their actions fail to meet the standards mandated by Congress, no one, and I repeat that, no one, -- not even the U.S. Environmental Protection Agency -- may seek to impose penalties upon them for those violations. Although the federal government routinely penalizes state and municipal governments if they violate the pollution laws, the federal executive branch has refused to be held to the same standard. It is apparently the position of federal facilities that, unlike the rest of our society, they need account only to themselves for their record of environmental contamination and how it should be addressed.

Instead of answering to an independent watchdog, federal agencies have long operated in the vacuum of their own conscience. Shrouding themselves in the veil of sovereign immunity and obfuscating details of their actions under the guise of national security, these agencies have believed that their only accountability is to themselves. This type of attitude breeds irresponsibility, and I can testify to the after effects of such arrogance.

Thinking they cannot be punished for their misbehavior, federal facilities have proceeded to compile an unenviable record of non-compliance that has been as bad as the very worst private sector violators we have encountered in Ohio. Their track record of noncompliance in Ohio, and their position that, unlike the rest of society their conduct is not subject to the independent review of U.S. EPA and state environmental agencies, constitutes the ultimate hypocrisy.

To illustrate the disastrous effects which result when a federal facility believes itself to be above the law, I would like to briefly describe the hazardous waste procedures which were practiced at two Department of Energy ("DOE") facilities in Ohio. These facilities are the Feed Materials Production Center near Fernald, Ohio and the Portsmouth Uranium Enrichment Complex at Piketon.

FERNALD

Any tale of arrogance and careless disregard for human health must start at the Department of Energy facility near Fernald. At this plant, DOE has illegally dumped hazardous waste into pits, allowed hazardous waste to leak into the environment from illegal drum storage sites, and carried on other illegal hazardous waste activities.

Although all hazardous waste facilities have been required since 1981 to install adequate monitor wells to detect hazardous waste constituents leaking into the groundwater, DOE did not comply with this requirement at Fernald until 1986. Contamination is believed to be coming from the illegal hazardous waste disposal in one of the pits.

To compound the fact that treatment, storage, and disposal of hazardous waste at Fernald was illegal, DOE did not manage the hazardous waste with even a pretense of safety. While the hazardous waste rules required operators to prevent leakage from drums of hazardous waste, DOE allowed leakage to occur. While the rules required hazardous waste facilities to be regularly inspected for health hazards, DOE for 3-1/2 years failed to do so. While the rules required aisle space between drums of waste so that operators could see leakage and other problems, and so that spill and fire fighting equipment could be moved around the drums, DOE disregarded this requirement. While the rules required an emergency contingency plan to inform workers how to safely respond to fires, explosions, and releases of hazardous waste, DOE ignored this precaution for 3-1/2 years. DOE failed to teach its workers how to safely handle hazardous waste, to write a proper closure plan, or to analyze its waste so it would know how to safely manage it. In short, DOE widely disregarded the rules of both the hazardous waste authorities and common sense. Over a period of years, DOE committed 17,483 days of hazardous waste violations.

After Ohio notified DOE and its contractor, NLO, that the State intended to file suit to correct the violations at Fernald, we attempted for a more than a year to negotiate a complete cleanup of the facility. When these negotiations were unsuccessful, we had no choice but to file a lawsuit against DOE and its contractor in 1986.

DOE's illegal activities at Fernald were a direct result of its feeling that the State of Ohio could not punish the Department for its wrongdoing. To emphasize this point, I would like to quote from the text of a document obtained during Ohio's lawsuit. (Appended as Attachment A). This document is an internal telephone memorandum written by an employee of NLO, the DOE contractor at Fernald, documenting his conversation with an employee of the DOE Oak Ridge Operations office ("ORO"). The memorandum states as follows:

> After receiving a copy of OEPA's [Ohio EPA's] letter (ref. 1) stating that they haven't received the written plans for hazardous waste management, I called Bob to ask what the situation was, since the requested material had been sent to ORO over a month ago. He said that it had been under review by ORO Legal Div. and that since OEPA doesn't yet have regulatory authority over DOE hazardous waste, no enforcement action could be taken. Therefore, he hadn't pushed it through the system. He said the material is now ready to go, and should be sent to OEPA soon. [Emphasis added].

I must emphasize that the overdue "written plans for hazardous waste management" sought from DOE were crucial to the safe operation of the Fernald facility. These plans were needed to establish procedures for safely responding to fires, explosions and releases of hazardous waste, for teaching workers at the plant how to safely handle hazardous waste, for analyzing hazardous waste to determine its hazardous characteristics, and for inspecting hazardous waste areas to detect releases and other hazards. Although these plans were submitted to Ohio EPA soon after this memorandum was written, by this time they were 1-1/2 years late. DOE obviously was in no hurry to obey the hazardous waste laws simply because the Department believed Ohio could not punish its misbehavior.

PORTSMOUTH URANIUM ENRICHMENT COMPLEX

The Portsmouth Uranium Enrichment Complex near Piketon, Ohio, has a similar shameful record of disregard for the hazardous waste laws. For years, DOE illegally dumped highly toxic hazardous waste into five surface impoundments or lagoons, two fields, and a landfill. Solvent contaminated oil was actually spread on the ground for years and roto-tilled into the soil. DOE also illegally burned oil and hazardous solvents in an incinerator known as the "Radicator". These incinerated substances probably contained mercury, a substance highly toxic to humans.

For eight (8) years, DOE failed to adequately sample the groundwater at Portsmouth for hazardous waste. Not surprisingly, once samples were collected, the groundwater was found to be badly contaminated with hazardous wastes. One sample contained a 100% concentration of trichloroethylene, a hazardous solvent. The wastes discovered in the groundwater are considered threats to the central nervous system and internal organs if ingested or absorbed through the skin.

When I drafted the lawsuit against the Portsmouth facility, I discovered that DOE had violated so many hazardous waste requirements that inclusion of all violations would have made the litigation impossibly complex. Therefore, the lawsuit in that case covers only the worst 32,361 days of violation of the twenty-one (21) most important hazardous waste safety requirements.

CLEANUP AT FERNALD AND PORTSMOUTH

I would note that Ohio has been successful in compelling the cleanup of both the Fernald and Portsmouth facilities. Court decrees signed with DOE for the Fernald facility in 1988 and for the Portsmouth facility in 1989 require strict compliance with all of the hazardous waste requirements, under the pain of contempt of court sanctions. Now that contempt sanctions are available to punish violations of the law, DOE's compliance, although still not perfect, has improved immeasurably.

Unfortunately, it took more than eight (8) years to achieve this compliance. Rather than complying voluntarily, DOE forced the State into almost three (3) years of litigation over Fernald and agreed to comply at Portsmouth only when the State moved towards similar litigation over that facility.

The years of DOE disrespect for the hazardous waste laws have resulted in very expensive cleanup responsibilities at Fernald and Portsmouth. Although cleanup is underway, completion of this cleanup is still years away due to its immensity and complexity. In the meantime, the illegally dumped hazardous waste continues to contaminate the environment.

While much of the dumping by federal facilities occurred before these activities became illegal, an enormous percentage of the disposal occurred after RCRA prohibited it. These expensive, injurious activities continued only because DOE and other federal agencies were convinced they could not be punished for them. Unless steps are taken to deter these agencies from future harmful practices, additional cleanup problems will increase the drain on the federal treasury. More importantly, the environment and the health of our citizens will continue to suffer while federal facilities delay compliance until forced into court.

JUSTICE DEPARTMENT POLICY

The need to subject federal facilities to all requirements of state and federal environmental laws including the assessment of civil penalties, which may be applied against any private violator, continues to be essential. Unless federal facilities know they will be punished for violating the law, they will have little incentive for compliance. This issue remains unresolved even in the Fernald case. Although Judge Spiegel of the District Court in Cincinnati ruled in 1987 that the Department of Energy could be subject to civil penalties under both state and federal law, the Department of Justice has appealed this decision.

The Justice Department has conducted a nationwide campaign to prevent the assessment of civil penalties against federal facilities. Their conduct causes me to agree with remarks made by Senator Stafford during the Superfund reauthorization debates in 1985. He said, "But no loophole, it seems, is too small to be found by the federal government."

Despite Congress' waiver of sovereign immunity in RCRA and other acts, the Justice Department continues to file voluminous briefs filled with technical arguments which strain the very words used by Congress.

This is the same Justice Department which seeks to impose civil penalties on financially strapped municipalities for failing to meet the requirements of the federal Clean Water Act. These conflicting postures constitute an enormous double standard.

The Department of Justice argues that:

1. The term "requirements' as used in Section 6001 only includes sanctions to enforce injunctive relief (punishment for contempt), not civil penalties;

2. The term "sanctions" does not include civil penalties; and,

3. The citizen suit provision, Section 7002, authorizes the courts to apply any appropriate penalties under Section 3008(g); since Section 3008(g) applies only to "persons", and "persons" as defined by Section 1004 does not include the federal government, penalties may not be assessed pursuant to a citizens' suit.

These arguments have been successful in five (5) other cases in which civil penalty claims were dismissed. These cases are: United States v. Washington, 872 F.2d 874 (9th Cir. 1989); Mitzelfelt v. Air Force, No. 88-1535-M (D.N.M. 1989); Meyer v. Coast Guard, 644 F.Supp. 221 (E.D.N.C. 1986); Mess v. Weinberger, 655 F.Supp. 601 (E.D. Cal. 1986); People of the State of California v. United States, 18 Envtl. L. Rep. 21,023 (E.D. Cal. 1988). The only other decision, besides our own, which has gone the opposite way is the case of Maine v. Department of Navy, 702 F.Supp. 322 (D. Me. 1988).

In addition to opposing the assessment of civil penalties against federal facilities, the Justice Department has taken similar positions on other hazardous waste enforcement mechanisms. In the case of California v. Walters, 751 F. 2d 977 (9th Cir. 1984), the Department convinced the Court of

Appeals for the Ninth Circuit that RCRA does not waive the sovereign immunity of federal agencies against criminal sanctions.

It is ironic that, of all of the environmental laws providing sanctions against federal pollution, the law protecting the public from the most dangerous pollutants has been under the greatest attack by federal agencies and the Courts.

Due to the absence of federal enforcement of environmental laws against federal agencies, the role of the states and their attorneys general in the enforcement of these laws against recalcitrant federal agencies has become more and more important. The Justice Department's efforts to avoid the imposition of sanctions against these federal agencies greatly undercuts the effectiveness of enforcement efforts by the states.

SANCTIONS AND THE PRIORITY SCHEME

Even when confronted with the consequences of their behavior, federal agencies continue to oppose the injection of responsibility into their hazardous waste practices. Their latest ploy is the argument that sanctions will be used by the states to disrupt the agencies' cleanup priorities. Although unable to cite any instances in which such state behavior has occurred, they wildly allege that states will issue orders and file lawsuits to recover penalties from federal agencies' failures to clean up low priority federal dumping sites. This will result, or so the argument goes, in federal agencies being forced to clean up low priority sites in "aggressive" states before they clean up high priority disposal areas in "non-aggressive" states.

This priority scheme demonstrates that federal agencies believe that they, and only they, should decide when and where the hazardous waste laws will apply to them. In other words, federal agencies are determined to conduct business as usual, without oversight by independent environmental agencies and without sanctions to correct their continuing misbehavior.

Despite the spectre of interference raised by federal officials, there is every indication that state involvement will improve federal cleanup measures rather than interfere with them. These indications are as follows:

1. To suggest that states would file lawsuits against low priority sites simply to obtain penalties for their treasuries is an insult to the integrity of the state officials who enforce these laws. Federal agencies can point to no instances in which a state has sued an undeserving federal facility for penalties. To the contrary, the states have acted responsibility under the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act even

though each of these statutes has a clear civil penalty waiver. In fact, there have been very few instances where penalty actions brought by states against federal facilities under any of these statutes. Where penalties have been imposed, they have been very reasonable.

2. The so-called "aggressive" states have vigorously enforced the law against federal facilities only because their citizens have been exposed to the worst contamination from these facilities. In other words, these states have been forced to become "aggressive" due to the presence of the highest priority, and not incoincidentally, most recalcitrant, federal facilities. For example, Ohio negotiated with DOE for more than a year in attempt to obtain a voluntary cleanup at Fernald and filed suit only because DOE refused to cooperate. Litigation has been used only as a last resort after federal agencies have refused to cooperate.

Once cleanup has started at these high priority facilities, the host states must spend considerable personnel time and effort to ensure that the cleanup is performed adequately. Given this considerable drain on their resources at the high priority sites, the "aggressive" states will not be ready to oversee cleanup at low priority sites until the high priority areas are finished. To suggest that these states will pour money and personnel into lawsuits and cleanups at low priority sites when they have already exhausted their resources at high priority sites flies in the face of reality.

3. Litigation against federal agencies is very difficult and time consuming. Most states do not have the resources to file these cases, and those who do have the resources exercise them sparingly on the most important, polluting facilities. To suggest that a state will waste its resources on low priority federal sites while high priority federal and/or private sites remain unaddressed is a contradiction to common sense.

4. If a state wanted to provoke an earlier cleanup even though other facilities had higher priority, the state could merely file an injunctive relief action in court to get an order against the agency requiring an earlier cleanup. This would be a much more effective means of disrupting national priorities than would be the assessment of civil penalties. Although this injunctive relief has been available against federal facilities since 1976, the states have yet to disrupt any national priorities that may exist. In fact, the lawsuits which have been filed by states and environmental groups thus far have all occurred at the worst federal facilities, such as Fernald, Portsmouth, Savannah River and Oak Ridge. Therefore, the states have helped to set valid priorities, not interfere with them.

5. Federal agencies have argued that states will use RCRA corrective action authority to order federal agencies to clean up low priority sites. However, only five states currently have been authorized by U.S. EPA to assume corrective action

authority and it is not known when the remainder will receive this authority. More importantly, some states, including Ohio and other industrial states hosting federal facilities, already have the ability to issue cleanup orders under state law. Corrective action authority thus will not increase their ability to disrupt priorities since they already have the ability to issue clean up orders. The fact that these states have not already used their order authority to disrupt priorities indicates that they will not use S. 1140 to jeopardize priorities.

b. The contention by federal agencies that states will sue low priority facilities merely to raid the federal treasury is internally flawed. Suing a site with little pollution will produce only a small fine or penalty, if any. If a state were truly irresponsible enough to sue solely to raise money, it would file against high priority private and/or federal sites to obtain larger fines and penalties.

Furthermore, litigation against the federal government is more complex and expensive than filing suit against private entities. Prosecuting a suit against a low priority federal problem is likely to cost more in litigation expenses than it will return in fines or penalties. If a state were indeed looking only for funds, it would file suit against private companies instead.

7. Some federal agencies have gone so far as to contend that states will file lawsuits against low priority sites simply for publicity. To suggest that a state would file an unnecessary suit simply for publicity is a slap in the face of state officials. This suggestion also defies common sense. The public is not interested in low priority sites. Instead, the public and the press have keyed on the federal facilities which have harmed the public and the environment. A state looking for publicity would concentrate its efforts at high priority sites, whether private or federal.

8. States and municipalities are subject to sanctions to enforce cleanup of all of their pollution problems, whether these problems involve hazardous waste, water pollution, or any other pollutant. They are not allowed to fund the cleanup of the worst sites first and to leave the remainder untouched in the meantime. In fact, they are sometimes forced to divert money from essential fire and police protection to fund cleanup and pay penalties for failure to do so. Because pollution from federal facilities harms the public just as much as pollution from private, state, and municipal facilities, as a matter of fairness federal agencies should be held to the same standards of conduct.

9. Most requests for hazardous waste sanctions will be heard by federal judges. In fact, even pollution lawsuits filed in state courts are routinely removed to federal court.

Therefore, federal judges will decide whether to assess sanctions in light of any Congressional priorities that might exist.

CONCLUSION

Proper management of federal plants should protect American citizens from both foreign and domestic threats. Sadly, in the past, federal agencies have chosen to ignore the safety of the public at home while concentrating on their defense missions. In the past, we have been able to curb federal pollution only by filing lawsuits against uncooperative federal agencies. The time has come to encourage federal agencies and employees to voluntarily comply even before the threat of litigation. Only then will we be able to avoid public exposure to toxic materials and expensive cleanup of the environment.

Building new camouflage techniques or fortifying existing facades designed to lessen the public's call for accountability will not assist federal agencies in meeting their new challenges. Therefore, I again urge this Committee to clarify existing law and remove the spectre of sovereign immunity used by the federal government to prevent accountability.

Mr. Chairman, I commend you and the members of your Committee for these hearings and I urge you to actively press for more comprehensive and specific waivers of sovereign immunity in the environmental statutes and to use your power to force reform within the federal agencies and a commitment to environmental quality from them. Our nation was built on the principle of checks and balances in order to avoid omnipotent power being exercised by a single person or entity. This basis tenet of our government should not be violated in an area as important as our environment.

Thank you.

0058E

ATTACHMENT A

NLO. INC.

DOE CONTACT REPORT

DATE:	ORIGINATOR:	TALKED TO:
7-12-84	T.A. Poff	Bob Sleeman (ORO)

2127837

SUBJECT:

RCRA DOCUMENTATION

SUMMARY OF DISCUSSION:

Ref: ① D.S. Marchall letter to R.M. Spenceley; July 9, 1984; "U.S. DOE FMPC - Hamilton County - Solid and Hazardous Waste"

② R.M. Spenceley letter to M.R. Theisen; June 6, 1984; "FMPC Documentation for RCRA compliance"

After receiving a copy of OEPA's letter (ref. 1) stating that they haven't received the written plans for hazardous waste management, I called Bob to ask what the situation was, since the requested material had been sent to ORO over a month ago. He said that it had been under review by ORO Legal Di and that since OEPA doesn't yet have regulatory authority over DOE hazardous waste, no enforcement action could be taken. Therefore, he hadn' pushed it through the system. He said the material is now ready to go, an should be sent to OEPA soon.

cc: M. W. Boback
D. E. Dier

INSTRUCTIONS:

1. Complete this form in sufficient detail to make Division Director and Manager generally aware of what transpired.
2. Forward two copies to Division Director, who in turn will send one copy to the Manager.

NLO-GEN-2401 (REV. 11/13/78)

Attorney General
Anthony J. Celebrezze, Jr.

May 9, 1990

The Honorable Quentin Burdick, Chairman
Committee on Environment and Public Works
United States Senate
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Burdick:

I am please to offer the following answers to the written questions sent to me by the Committee.

Sincerely,

Jack Van Kley
Jack A. Van Kley
Assistant Attorney General

0169E
mp

State Office Tower / 30 East Broad Street / Columbus, Ohio 43266-0410
An Equal Opportunity Employer

QUESTIONS FOR
JACK VAN KLEY

ANSWERS TO WRITTEN QUESTIONS OF THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

1. In the hearing there was a concern raised about the process for issuing and reviewability of administrative penalties and fines. Please indicate what adjudicative procedures generally would be applicable under state laws where administrative fines and penalties were sought for RCRA violations. Please indicate what type of judicial review would be available for such administrative fines and penalties. Illustrations from actual state laws would be helpful if possible.

Because the process by which administrative penalties are assessed must comply with the constitutional guidelines of due process, a state must give a person an opportunity for a hearing to contest any assessed penalty. The state ordinarily must prove that the violations have occurred and that the size of the penalty is appropriate. These determinations are ordinarily appealable to the courts.

For a detailed description of how a state's administrative penalty system works, see the description of Washington's process in the attached letter of James Pharris.

2. Some have argued that S. 1140 would result in local officials, conceivably using local administrative powers, to issue administrative fines and penalties to federal installations for violations of local laws or requirements. Please comment on the likelihood of such local actions based on the Ohio experience as well as the general environmental operating procedures of other states. Please also indicate whether even in the event of such a scenario there would be an opportunity to adjudicate such fines and penalties as well as to obtain judicial review. Please comment on the type of adjudication and judicial review that would be available in such a scenario.

Our experience has been that local officials do very little enforcement against federal facilities even though RCRA has provided localities with enforcement authority equal to that of the states since 1976. In Ohio, we are unaware of a single case brought against a federal facility by a local government.

There are several reasons for this lack of enforcement. First, most local governments lack the scientific and legal expertise necessary to bring such a case. They do not have the scientific experts or environmental lawyers on their staffs needed to write hazardous waste regulations, to do inspections for hazardous waste violations, or to bring hazardous waste cases. In fact, due to the complexity of cases against the federal government, some states even lack the resources to bring such a lawsuit against a federal facility.

Second, many local governments are intimidated by federal agencies. They would never seek to penalize the federal government.

Third, many localities depend on a federal facility for jobs and income. They would not penalize a federal agency for fear of encouraging the agency to relocate its operations or reduce the amount of business done in their locales.

If a local government were to assess an administrative penalty, or as some have postulated, issue a "ticket" for a hazardous waste violation, the locality would be bound by the same due process considerations as the states. Therefore, the locality would still have to prove its case in a complicated hearing complete with scientific and legal experts. Given the inability of most local governments to carry such a burden, the availability of administrative penalties or tickets is not likely to increase local litigation against federal facilities.

It should be noted that local governments have penalty authority under other environmental statutes, such as the Clean Air Act. This has resulted in very little local litigation against federal facilities, for the same reasons as explained above.

3. In the hearing it was suggested that criminal sanctions might be applied to federal employees at federal facilities due to failure by the President to request funds necessary for such employees to take steps necessary to comply with the law. Do you believe that criminal sanctions would be imposed in such a situation.

Initially, we would note that any person employed by a private entity, municipality, or state can be prosecuted for committing a hazardous waste crime. A person should not be above the law simply because he/she draws a federal paycheck.

During the hearing on S. 1140, concern was expressed for a federal employee who might be prosecuted simply because the President failed to request adequate funding for compliance. However, successful criminal prosecution hinges on proof of the requisite criminal intent of the defendant. For example, the Ohio hazardous waste statute requires that a defendant be proven to have had at least a reckless state of mind before he/she can be convicted. Other criminal statutes require proof of the even more stringent intentional state of mind. This intent has not been exhibited by an employee who has done everything in his/her power to comply with the law. Such a person would not be prosecuted, much less convicted, if he/she was not at all at fault for the violations.

On the other hand, a federal employee who participates in criminal acts, or knowingly fails to stop illegal activity by those under his authority, should be punished for such irresponsible behavior. Even more certainly, an employee who independently undertakes a hazardous waste crime without the knowledge of his agency superiors or in disobedience to instructions or agency policy should reap the consequences of his/her action. No one can seriously contend that an employee should be allowed to escape free of retribution after he/she has dumped hazardous waste into a stream or taken other action to endanger the public. To provide otherwise would merely encourage federal employees to act in a dangerous manner, to the harm of others.

In recognition of this reality, other environmental statutes such as the Clean Air Act, Clean Water Act and

Safe Drinking Water Act authorize the imposition of criminal sanctions for illegal activities. See the use of "all ... sanctions" in those statutes. Congress was of the same mind when it enacted RCRA in 1976. This intent should be preserved and clarified by passing S. 1140 in its present form.

4. In the hearing it was suggested that Ohio already had an effective enforcement tool by virtue of its ability to enforce its consent decree against the Fernald facility. Please comment on this suggestion.

Rather than proving that there is no need for S. 1140, the history of the Fernald litigation demonstrates the urgent need for this legislation. Ohio currently has very strong injunctive relief in a court decree against the Fernald facility to compel compliance. This decree has improved DOE's compliance immeasurably by making contempt sanctions available to deter any violations.

Unfortunately, DOE had been violating the hazardous waste laws for almost eight (8) years by the time the court injunction was awarded. In the meantime, DOE's violations increased the cost of cleanup. The court order was obtained only after years of intense, expensive litigation. Had DOE understood that it would be penalized for this conduct, it would have avoided this illegal behavior and reduced the price of cleanup accordingly.

The history of Fernald illustrates why citizens living near a federal facility may be struck with anxiety due to their realization that federal agencies might not be punished for their wrongdoing until the time that a court injunction has been issued. The neighbors of the Fernald facility were outraged to discover that, according to some of the courts, the present RCRA waiver allows a double standard for federal facilities. These citizens realize that a federal official has little incentive to comply until a lawsuit has been brought to its conclusion. In the meantime, since a lawsuit for an injunction ordinarily cannot be brought until a violation has already occurred, harm can befall the public before a state is empowered to do anything about it. This is not healthy for the peace of mind of those living near federal facilities.

5. In the hearing it was suggested that the Ohio case against the United States Air Force illustrated how states can effect large penalties. Please comment on this suggestion.

This testimony of the Department of Defense ("DOD") is illustrative of its strategy for defeating or weakening this bill. Seeking to paint the states with the brush of irresponsibility, the federal agencies have accused the states of trying to rob the federal treasury. During the hearing, DOD dramatically declared that Ohio had failed to tell the Committee that it had initially assessed a penalty of $25,000 per day which was subsequently reduced during litigation.

However, Ohio did not assess a penalty of any amount. The State simply filed a complaint in court requesting that a civil penalty be assessed by the court.

Ohio law authorizes a court to assess a civil penalty in an amount between $0 and $25,000.00 per day for air pollution violations. This sliding scale for penalties allows a judge to determine the seriousness of an offense and to adjust the penalty accordingly. The uninformed sometimes sensationalize the penalties sought by a state environmental lawsuit by multiplying the maximum potential penalty against the number of violations to calculate a total, and usually very large, penalty. However, the maximum is rarely, if ever, imposed by a court. In fact, although Ohio air pollution complaints as a matter of form ordinarily request the maximum penalty, the maximum is rarely, if ever, even requested by the State at trial.

The maximum is rarely, if ever, requested in settlement discussions, either. In this case, the State made an opening offer of a million dollars, but told the Air Force that the vast majority of this figure would be forgiven if the Department agreed to undertake projects to reduce its impact on the environment. Eventually, the case settled for $25,000, a figure both sides agreed was fair. This comes to $2.43 for each of the 10,270 days of violations, a far cry from the $25,000 per day DOD alleged Ohio to have assessed.

During the consideration of H.R. 1056 by the Transportation Subcommittee of the House Committee on Environment and Public Works, the Department of Defense presented an internal DOD memorandum dramatically declaring that Ohio was seeking civil penalties in this case in excess of $500,000,000. This is typical of the scare tactics being used by the federal agencies to convince Congress that the states are out to raid the federal treasury. Real history, however, confirms the responsible behavior of state officials when exercising their authority to pursue penalties. Although states (and municipalities) have been able to obtain penalties under the Clean Air Act, Clean Water Act, and Safe Drinking Water Act for thirteen (13) years, the cost to the federal government has been extremely low. Rather than providing a vehicle for state and local governments to raid the federal treasury, the civil penalty mechanism in these statutes has made the federal treasury the beneficiary of far more penalty money taken from state and city coffers. If any treasuries are being raided, it is only those of the states and municipalities.

6. What is your view on conditioning state RCRA fines and penalties against federal facilities upon either or both Presidential budget requests or Congressional appropriations.

After carefully considering the behavior of the defendant federal agency at trial, and based upon evidence heard at trial, a court would make its decision on the propriety of a penalty to discourage future violations. To have a penalty contingent upon a Presidential budget request or Congressional appropriation interferes with the judiciary's authority to address violations of the law and offends the concept of separation of powers. In the case of a Presidential budget request, the very person ultimately responsible for ensuring that the executive branch comply with the law has the ability to exempt the executive branch from punishment for violations of that law. Even where the hazardous waste violations result from the failure of the President himself to request the funding necessary to comply, the same person who caused the violation has the option of handcuffing any judicial attempt to punish the executive branch for its irresponsible behavior. The President obviously has a conflict of interest that disqualifies him from making the decision about penalizing his own organization.

By conditioning payment of penalties on Congressional or Presidential approval, a waiver would remove much of the federal agencies' incentive to comply. Federal facilities will not be as anxious to comply if they know that either Congress, or especially the President, can get them off the hook even after they have been penalized.

Obtaining penalties against a federal agency is already a very difficult process infrequently attempted by states and local governments. Creating the possibility that, after litigating a very complex, expensive case, a state or locality may see all of its efforts erased by

Congress or the President will make enforcement actions even rarer events than they presently are. In the case of Congressional approval, the state or locality will have to litigate a very difficult case and then be forced to defend its judgment before a possibly hostile budget committee.

The opportunity for federal agencies to defeat a penalty even after it has been assessed removes much of their fear of being penalized. This in turn decreases the incentive of the federal agencies to comply and creates additional expensive cleanup projects.

7. Please elaborate on your discussion of whether courts of law (as opposed to equity) could or would evaluate issues of federal agency national environmental priorities when imposing fines and penalties upon a federal installation for violations in a particular court?

If Congress failed to appropriate funds for a project because all of the money had been used on higher priority cleanups, the federal defendants would request that the court consider this factor in both law (the penalty portion of the case) and equity (the injunction). According to the civil penalty policy and caselaw, one of the factors used in the calculation of a penalty is the attitude of the defendant. A defiant or purposeful defendant ordinarily receives a higher penalty than does someone who accidentally or unintentionally violates the law. If a federal defendant has done everything it can to obtain the funds necessary to comply but has been thwarted in its efforts due to no fault of its own, the court will probably take this state of mind into account. If Congress has declined to fund a defendant's cleanup due to the use of all available money at other, higher priority sites, this is a factor the court may consider.

A second factor used in calculating a penalty is the degree of harm caused to the environment by the violations. If the subject of the lawsuit is truly a low priority site, it will be causing little or no damage to the environment. This fact will also ordinarily be considered when assessing a penalty.

8. In the hearing some suggestions were offered on distinction between fines and penalties based on whether they were for corrective action, compliance, past, or prospective violations. Please elaborate on your testimony about the advisability of such distinctions. Please also discuss whether any other type of distinction, including one between active and inactive sites, would make sense.

The Department of Defense testimony supports sanctions for violations occurring during "day-to-day operations and management of hazardous waste as distinguished from cleanup projects or major facility modifications." Written testimony of David Berteau, pg. 1. Others have distinguished between "compliance" and "corrective action," proposing that the latter be exempt from sanctions.

Whether called "cleanup" or "corrective action," an exemption for these activities would give federal facilities an opportunity to manage a major portion of their hazardous waste activities in a harmful fashion. Many of a facility's hazardous waste responsibilities can be called either compliance/management or cleanup/corrective action. For example, a groundwater monitoring system is an integral component of a facility's arsenal to detect leaks in an early fashion and to thus prevent further releases. As such, it is considered to be an operations requirement for every land disposal facility. However, the same groundwater monitoring system may also be a component of a cleanup project by measuring the amount of hazardous waste which has been released and by measuring the effectiveness of efforts to remove the leaked waste from the groundwater. The operations/management regulations for a facility also may require the removal of hazardous waste constituents from the groundwater after detection by monitoring, a duty which obviously might also be called cleanup/corrective action.

Similarly, the operator of a surface impoundment must take steps to stop leaks from the impoundment, an action which obviously could also be called cleanup/corrective action. A host of closure plan regulations, designed to safely take a hazardous waste facility out of service and remove contamination from the facility once its useful life ends, could also be viewed as cleanup.

Even a regulation as basic to the day-to-day operation of a facility as the contingency plan requirement could be viewed as cleanup/corrective action. This regulation requires that this emergency plan be implemented whenever fires, explosions, or releases of hazardous waste threaten human health or the environment. Implementation of the contingency plan to remove the threat necessarily requires recovery of the released hazardous waste from the environment and/or other actions which could be called cleanup/corrective action.

The requirement that an operator transfer hazardous waste from leaking or deteriorated drums to good drums, a standard operating requirement, could also be termed cleanup/corrective action. Likewise, the removal of hazardous waste spilled or leaked from a drum or other device could be viewed as cleanup/corrective action.

Thus, there is no workable distinction between management/compliance and cleanup/corrective action. An exemption for the latter will only promote further irresponsibility, and worse cleanup messes, at federal facilities. It would be unwise indeed to leave environmental agencies with no tools to effectively force a federal violator to fix the problems it has caused by violating the law. Even more ironically, the worst violators, that is, those who have shown themselves to be the least trustworthy, will be allowed the greater leeway in their activities because they are undertaking more cleanup/corrective action.

Cleanup/corrective action can itself harm the public if performed in an irresponsible fashion. Exempting these activities from sanctions allows federal agencies to perform them in a manner which violates the law and harms the public just as much as or more than did the violations which caused the need for the cleanup/corrective action initially. An operator who has shown himself untrustworthy by contaminating the environment is the last person who should be given unfettered discretion in its cleanup.

Finally, it is important to note that the Justice Department touts the "strict construction" rule of statutory interpretation for waivers of sovereign immunity. That is, according to the Department, a court must decide against the waiver if there is any doubt at all about Congressional intent to waive. Therefore, the Department believes a waiver must be absolutely unambiguous before it will be applied to a federal agency. The ambiguity of the terms "clean-up" and "corrective action" would lead Justice to argue that a very large portion of the hazardous waste requirements could not be enforced against federal facilities, spawning even more litigation over federal facilities. It is in no one's interest to adopt such a distinction.

If the bill were to exempt federal facilities from sanctions for past violations, the federal facilities would receive a windfall not intended by Congress in 1976 and 1984. Congress clearly intended to authorize sanctions when enacting the previous RCRA legislation. Retroactively providing amnesty to the agencies after they thumbed their noses at the law hardly constitutes justice and provides a bad example for private industry and municipal governments.

More importantly, amnesty granted now could provide uncertainty in the minds of federal officials as to whether their future violations will be punished. If they think there is a chance Congress might bail them out again in the future, they will be less likely to try hard to comply with the law. Therefore, amnesty for past violations would send the wrong message to the federal facilities.

With regard to past violations, care must also be taken not to undermine the enforcement actions which have already been brought under the current law, such as those pending in Ohio and Maine.

A distinction between active and inactive sites would also be unworkable. First of all, the clean-up itself could be dangerous to the public if conducted irresponsibly, as discussed above. Second, some currently inactive sites may have been active for some time after the enactment of RCRA. If they are thus illegal sites, they should not be exempt from sanctions designed to compel a clean-up. Third, even though a site may be "inactive" in the sense that disposal is no longer occurring, it still may be an ongoing menace. For example, it may be still leaking hazardous contaminants into the groundwater. The corrective action requirements of the 1984 amendments to RCRA were thought necessary for that reason and sanctions were provided to curb this threat. It makes little sense to provide less incentive to clean up an old polluting site when it is every bit as dangerous as a newer site.

0165E

Gregory P. Canova
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Bruce P. Clausen
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ATTORNEY GENERAL
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April 30, 1990

Lynne Ross
Deputy Director and Legislative Director
National Association of Attorneys General
444 North Capitol Street, N.W.
Washington, D.C. 20001

Re: Enforcement of State Civil Penalties Against
Federal Agencies

Dear Lynne:

In a recent telephone conversation you said it might be helpful to your legislative efforts to have a simple description of the procedural steps involved in issuing and reviewing a civil penalty under a state environmental regulatory scheme, especially in the context of a federal agency. Some of the major federal environmental statutes contain partial waivers of sovereign immunity which subject federal agencies to state enforcement, including payment of state civil penalties. This limited leverage has proven valuable to several states in achieving cooperation from federal agencies operating facilities within those states.

However, the waiver of sovereign immunity is still very controversial. An objection often made is that states may abuse the waiver of federal sovereign immunity by subjecting federal agencies to particularly strict enforcement or stiff penalties, perhaps more for the purpose of fattening the state treasury than for legitimate environmental purposes. This letter is intended to respond to this objection.

The overall response to the objection is that where a state in good faith imposes a reasonable penalty upon a federal agency for violating state and/or federal environmental statutes, the federal agency should, as a matter of federal public policy, be liable for the penalty to the same extent any other person would be. On the other hand, if the state is acting in bad faith and making non-meritorious claims against the federal agency, or imposing unreasonable penalties, federal agencies are fully protected by a whole series of procedural safeguards from state attempts to "raid the federal cookie jar."

I believe the State of Washington is fairly typical in the structure of its environmental laws and in the procedures available when the state imposes a penalty. The first point to consider is that there are statutory limits on the penalties which can be imposed. In this state, a typical upper limit for penalties is $10,000 per day for each violation. This is the limit, for instance, under our hazardous waste management laws (RCW 70.105.080) and under our water pollution laws (RCW 90.48.144). These limits prevent any state from going wild and penalizing federal agencies in unreasonable amounts.[1]

Suppose, given state civil penalty laws similar to those outlined above, a state were to issue a notice of civil penalty against a federal agency, one which the federal agency felt was improperly or unjustly issued. What could the federal agency do to protect itself? First, the federal agency could seek administrative review of the state agency's action. In this state, almost all agency regulatory actions are subject to some form of administrative review. In the case of environmental laws, almost all of them are reviewed by the Pollution Control Hearings Board, a three member board appointed by the Governor and "qualified by experience or training in pertinent matters relating to the environment . . . ." RCW 43.21B.020. At least one member of the board must be an attorney. This board has jurisdiction to hear and decide appeals from, among other matters, civil penalties imposed pursuant to air pollution laws, solid and hazardous waste laws, water resource laws, and water pollution laws in the state. RCW 43.21B.110.

The board conducts formal hearings similar in content and in procedural safeguards to judicial hearings, and makes decisions according to all of the evidence presented. (The board is not limited to a review of agency action "on the record," for instance.) The board can affirm or reverse the agency's action, and has consistently asserted (sometimes over our objection, frankly) the authority to reduce or modify penalties even when finding liability on the part of an alleged violator. The Pollution Control Hearings Board is legally and politically independent of the State Department of Ecology and other agencies whose orders it reviews, and has a track record to show that it treats federal agencies as impartially as any other parties appearing before it.

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[1] When Congress has any concern about the fairness of states and possible temptation to treat federal facilities different from other persons, it can tailor its waiver of sovereign immunity to prevent that occurrence. This has been done, for instance, in the case of the Resource Conservation Recovery Act (RCRA), see 42 U.S.C. § 6961.

If a federal agency is still not satisfied of the justness of a Pollution Control Hearings Board decision, there is judicial review available. This review can be taken within 30 days from any final decision and order of the hearings board, and is ordinarily filed in the state's court of general jurisdiction (the superior court). RCW 43.21B.190. The standard of review is governed by the state's Administrative Procedure Act (ch. 34.05 RCW). As a general matter, judicial review is "on the record," and the court can reverse the board if it has acted unconstitutionally or in excess of statutory authority, has failed to follow a prescribed statutory procedure, has erroneously interpreted or applied the law, or has made a decision which is not supported by evidence that is substantial when viewed in light of the whole record before the court. RCW 34.05.570. Parties not satisfied with superior court decisions in Washington can appeal environmental matters to the state court of appeals and to the state supreme court "as in other civil cases." RCW 43.21B.190.

To summarize to this point, a federal agency receiving a civil penalty from this state can seek administrative review and, if not satisfied with the result of that process, has three levels of state court appeal available to it. If even the state supreme court fails to do justice in the eyes of the federal agency, the United States can of course petition for mandamus from the United States Supreme Court, which historically has given considerable deference to petitions coming from the United States government.

If for any reason the federal agency is concerned about the fairness of state court review, current federal law in virtually every case would permit the federal agency to remove a case once in the courts from state to federal court. In this case, review can proceed through the federal courts, from federal district court to the circuit courts of appeals to the United States Supreme Court.

The procedures I have just discussed show how thoroughly any state action against a federal agency can be reviewed, and how unlikely it is that a state could successfully assert a dubious penalty against a federal agency and use it for the unjust extraction of dollars from the federal treasury. Quite aside from all these legal safeguards however, the states are well aware that political considerations require the states to be scrupulously fair in dealing with federal agencies. Congressional waivers of sovereign immunity can be modified or repealed at any time, and states know very well that if they abuse their civil penalty authority, Congress can act very quickly to protect the federal treasury. Even where states obtain judgments against federal agencies, actual payment of the judgment will depend upon Congressional appropriation.

There is no serious chance that a state could use its environmental laws to treat the federal government unjustly or arbitrarily. The states do not want to do so and if they did, both legal and political considerations would prevent it. On the other hand, without waivers of sovereign immunity, states have little legal leverage against federal agencies who choose to ignore or flout state environmental laws. Subjecting federal agencies to limited state regulatory authority in the environmental area improves federal-state relations and furthers national environmental policy.

Very truly yours,

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JKP:cas
138/ross

cc: Ken Eikenberry
Jim Johnson

STATEMENT OF

CHRISTINE O. GREGOIRE
DIRECTOR

STATE OF WASHINGTON

DEPARTMENT OF ECOLOGY

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

May 2, 1990

Good Morning Mr. Chairman, and members of the committee. I am Christine Gregoire, Director of the Washington State Department of Ecology. On behalf of the state of Washington and Governor Booth Gardner, and on behalf of the National Governor's Association (NGA), it is my pleasure to offer testimony in support of Senate Bill 1140, the **Federal Facility Compliance Act of 1989**.

I have worked intensively on federal facility compliance issues both in my role as Director of the state Department of Ecology, and in my previous position with the Washington Attorney General's Office. I am grateful for the opportunity to discuss the importance of passage of S 1140, and to describe to you why a clear waiver of sovereign immunity is essential to effective, timely, and cost conscious cleanup efforts at federal facilities.

INTRODUCTION

In beginning, I would like to briefly outline a few of the recent key events which have resulted in our being here today. Events which have finally brought us near the point of surpassing the jurisdictional squabbling of the past five years, and to the point of initiating productive compliance and cleanup programs at federal facilities.

The first of these is the applicability of RCRA to mixed waste. The early 1980's saw states and the U.S. Department of Energy (USDOE) locked in dispute over the applicability of federal and state hazardous waste law to "mixed waste", that is, waste exhibiting both radioactive and non radioactive hazards. Recognition of the applicability of these statutes by USDOE and the Environmental Protection Agency (USEPA) in 1987 enabled the regulators to finally begin to forge specific plans for improved management of wastes within the federal sector.

Second, we have seen a move to the negotiation of comprehensive compliance and cleanup agreements which delineate necessary waste management and cleanup actions. These agreements also define the respective roles of the state, the USEPA, and the site owner and operators (whether USDOE or the Department of Defense (USDOD)). It is specifically these agreements which offer us the opportunity to begin to rebuild public confidence, and to move to effective cleanup.

Third, Secretary Watkin's initiatives since his confirmation have demonstrated that he recognizes the magnitude of cleanup problems facing the agency, and that he intends to work with us, and to deal with issues as surmountable problems. The Secretary has continually recognized the importance of implementing broad cultural change throughout USDOE, and the implementation of initiatives which demand openness with the regulators, Indian nations, and the public. The Secretary's continued leadership and determination in the face of this unprecedented effort is highly commendable.

Fourth, both Secretary Watkin's initiatives and initial agreements between the federal government and states have allowed us to finally begin to regain the public's confidence that we mean business. Failing to clarify that environmental laws and legal agreements are enforceable would only serve to establish and perpetuate ineffective and inefficient cleanup efforts. It would send a message to the public which is directly contrary to the Secretary's initiatives and to our progress of the past few years.

We thus find ourselves in the position of having recognized the tasks we face, and the fact that our success is dependent on developing a strong and efficient cleanup process. A process that is based on the equitable application of environmental regulations, whether the facility be private or public, and one which is firmly based on citizen support. Passage of S 1140 is essential to this success.

SOVEREIGN IMMUNITY

Unfortunately, USDOE and USDOD recognition of the need for action has stopped short of recognizing that enforceability is critical to the development of efficient cleanup programs. Each has been quick to claim immunity whenever states have attempted to enforce environmental laws, regardless of the merits of violations cited. These actions to avoid compliance and cleanup both prolong the task, and increase overall costs and impact on the environment. In the instance of the federal Resource Conservation and Recovery Act (RCRA), federal agencies have ignored direction by the Congress at section 6001, and have successfully avoided enforcement actions by claiming that language within the Act is unclear.

The Department of Justice (USDOJ) has taken the position that the waiver of sovereign immunity in RCRA is not broad enough to allow the imposition of civil penalties and administrative orders, or the imposition of criminal sanctions. Thus, according to USDOJ, enforcement options, other than full blown litigation, are simply not available against federal agencies.

It is our belief that these stances by the United States should be recognized as residues of the federal government's unacceptable positions of the past towards waste management. They are counterproductive to Secretary Watkin's initiatives, and to the success of our joint efforts to achieve timely and efficient compliance and cleanup of federal facilities. Governor Gardner and I wholeheartedly endorse recent recommendations of the NGA and the National Association of Attorneys General (NAAG) that:

1. Congress should clearly waive federal sovereign immunity from the application and enforcement of federal and state environmental laws, and

2. Congress should enact legislation to improve USEPA's ability to regulate other federal agencies.

S 1140 would implement each of these recommendations.

I would also like to point out that this call for legislation has recently been supported by the governors of 10 key states (Colorado, Idaho, Kentucky, Nevada, New Mexico, Ohio, Oregon, South Carolina, Tennessee, and Washington). Their comments, submitted to Chairman Burdick, to Senator Johnston of the Committee on Energy and Natural Resources, and to the Secretary, were delivered to committee members on Monday.

S 1140 IS CRITICAL TO THE SUCCESS OF CLEANUP AGREEMENTS

The fact that federal facilities are far behind the private sector in initiating environmental compliance and cleanup programs is beyond dispute. So is the fact that many of our largest and most complex waste management challenges lie within the federal sector.

In Washington, at the Department of Energy's Hanford site, we face staggering quantities of radioactive mixed wastes stored in failing and troublesome facilities. Dealing with these wastes will require decades of highly technical and interrelated projects, each of which has recently been agreed to within the Hanford Federal Facility Agreement and Consent Order (USDOE, USEPA, and the Washington Department of Ecology, May, 1989). This long sought agreement was issued by the state as an administrative order under the state's authorized Hazardous Waste Management Act. USDOE chose to remain silent when asked to recognize it as such.

Mr. Chairman, if federal facility agreements such as that at Hanford are not clearly enforceable, we stand little chance of ever achieving compliance or effectively completing cleanup. Further, assertions that the opportunity exists to sue for compliance with agreement terms is little cause for comfort. As you know, litigation is typically used only in the most dire of circumstances, and is most often a last effort after repeated and serious difficulties. When used, litigation often results in extended delays (and in fact may be used as a delaying tactic). Arguments often center on legal defenses such as immunity rather than merits of the case itself. The end result is all too often both a lack of real action, and further erosion of the public confidence.

To be effective, federal facility agreements must be backed up by the same enforcement sanctions as agreements within the private sector. States must have the ability to issue administrative orders requiring actions necessary to comply with environmental statutes, or to regain compliance with the terms of legal agreements. Civil penalties must also be a recognized option. They represent an equally important tool, and are often used in differing circumstances. For example, it does little good to issue an administrative order following an intentional or negligent release to the environment (promises of no repetition are fast to come). Our experience in Washington (at both private and federal facilities) has shown that the standing deterrent value of the civil penalty is effective, and results in the actual issuance of few penalties.

It is also important to recognize that clarifying RCRA's waiver of sovereign immunity will enhance the effectiveness of agreements, but will not replace standard dispute resolution processes. These processes are typically designed to precede formal enforcement actions and offer the opportunity to resolve issues early on. If resolution is not possible, and enforcement actions are taken, the federal facility would have available to it all standard opportunities for appeal on the merits of the case, for example, state pollution control hearing boards, and both state and federal court systems.

FEARS THAT S 1140 WILL RESULT IN EXCESSIVE PENALTIES ARE UNFOUNDED

One of the most persistently heard concerns over passage of S 1140 is that it would result in excessive penalties. This argument is not born out by experience in the private sector, or in those cases where federal sovereign immunity has been clearly waived.

In Washington, a total of only 5 penalties have been assessed against federal facilities in the past five years. These penalties covered hazardous waste, air quality, and water quality violations. They totaled $79,250, and ranged from a $250 water quality fine against the Bureau of Reclamation (uncontested and paid), to $49,000 against the USDOE for a series of very serious violations of our state hazardous waste laws. We were unsuccessful in collecting this penalty due to claims of immunity. It is my belief that states have, and will continue to act responsibly in enforcing environmental laws. What we are asking for is your recognition that environmental compliance in the United States needs to be implemented on a level playing field.

Arguments that clarifying state abilities to enforce environmental requirements will result in raids on the federal treasury also do not take into consideration the following factors:

1. That the monetary amount of civil penalties is generally low and is limited by state statute to specific amounts. Such penalties usually do not exceed $50,000, and most commonly are in the $5,000 to $20,000 range. Penalties in states such

However, it must be remembered that the one basic tenet of such a system, and one which is too often overlooked, is that a priority system must support compliance and cleanup agreements rather than detract from their effectiveness. In fact, schedules negotiated under the context of a cleanup agreement **are prioritized** as site technical and management staff, the regulators, and the public identify individualized needs and situations at sites within each state.

I also note that this past year my staff have participated in USDOE's External Review Group (ERG) under the Secretary's five year planning process. This group was set up specifically to study available prioritization systems, and to aid USDOE in establishing such a system. Our experience to date has revealed that site ranking methodologies available today are, without exception, complex and highly questionable as to their ability to accurately rank site priorities. Key states have all urged caution in accepting any such system without full validation. USDOE has also recognized the need for caution, and has committed to working towards the implementation of a system which aids the establishment and implementation of effective, responsive, and individualized cleanup programs.

CONCLUSION

Events over the past few years have resulted in broad recognition that federal facilities present some of the most challenging waste management problems in the United States, and that they are far behind the private sector in implementing effective hazardous waste compliance and cleanup agreements.

as Washington are developed under strict guidelines defining the severity of violations, and controlling the amount assessed.

2. That penalties are often issued only after cooperative attempts at resolution have failed. The administrative burden of the appeals process has the tendency to keep the number of penalties down.

3. That the state's interests are in effecting federal facility compliance and cleanup. If federal agencies are serious about compliance with environmental requirements, few penalties will be necessary.

4. That experience has shown that it is the very fact of the penalty and the associated publicity, rather than the amount, that make penalties an effective deterrent.

THE RELATIONSHIP OF PROPOSED NATIONAL PRIORITIZATION SYSTEMS AND CLEANUP AGREEMENTS

Another important factor in establishing effective cleanup programs is the ability to identify and undertake actions on a priority basis, that is, to address the worst cleanup problems first, and to approach large projects in a step by step fashion. We agree that this concept makes good sense, and have continually supported efforts to establish a valid prioritization system, as long as it is consistent with and supports negotiated cleanup agreements.

However, substantial progress towards the implementation of effective cleanup programs has resulted from the recognition that USDOE and USDOD are subject to the same environmental laws (to the same extent), as the private sector. Secretary Watkin's recognition of the need to leave attitudes of the past behind, and to build commitments on the basis of full regulatory and public participation is the cornerstone of our hopes for further progress and successful cleanup.

Objections to S 1140 should be seen as counterproductive to Secretary Watkin's environmental initiatives, to the implementation of effective cleanup programs, and to rebuilding public confidence in the federal government's capabilities. USDOE and USDOD claims of sovereign immunity from state attempts to enforce environmental laws represent a vestige of the protectionism of the past. Claims that state civil penalty authority will result in excessive fines are not borne out by experience, either in the private, or the federal sector. Cleanup agreements must be clearly enforceable if we are to have any hope of successful implementation. Proposed prioritization systems need substantial additional development, and should not be accepted unless they support rather than mitigate cleanup agreements.

For these primary reasons Governor Gardner, and the National Governor's Association urge rapid passage of S 1140 in its present form.

Thank you for the opportunity to testify before the Committee.

TESTIMONY BEFORE

THE

U. S. SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

ON S. 1140

BY

THOMAS P. LOOBY, DIRECTOR, OFFICE OF
HEALTH AND ENVIRONMENTAL PROTECTION

COLORADO DEPARTMENT OF HEALTH

MAY 2, 1990

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, MY NAME IS TOM LOOBY. I AM THE ENVIRONMENTAL DIRECTOR FOR THE STATE OF COLORADO. I AM TESTIFYING THIS MORNING ON BEHALF OF THE STATE OF COLORADO AND THE NATIONAL GOVERNORS' ASSOCIATION (NGA).

THE FIRST THING THAT I WOULD REQUEST IS THAT YOU ALLOW ME TO INTRODUCE A DOCUMENT INTO THE HEARING RECORD. IT IS A LETTER FROM GOVERNOR ROY ROMER OF COLORADO URGING PASSAGE OF S. 1140.

I WOULD ALSO LIKE TO DISCUSS A REPORT PREPARED BY THE NGA IN CONJUNCTION WITH THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL ENTITLED "FROM CRISIS TO COMMITMENT: ENVIRONMENTAL CLEANUP AND COMPLIANCE AT FEDERAL FACILITIES."

AS YOU KNOW, COLORADO HAS BEEN "BLESSED" WITH TWO INFAMOUS FEDERAL FACILITIES....THE DEPARTMENT OF ENERGY'S ROCKY FLATS NUCLEAR WEAPONS PLANT AND THE DEPARTMENT OF DEFENSE'S ROCKY MOUNTAIN ARSENAL. BOTH SITES HAVE ENORMOUS ENVIRONMENTAL CONTAMINATION PROBLEMS AND HAVE HAD A LONG HISTORY OF POOR COMPLIANCE WITH FEDERAL AND STATE ENVIRONMENTAL LAWS. WE THEREFORE CAN OFFER OUR VIEWS BASED ON EXTENSIVE EXPERIENCE IN ATTEMPTING TO SECURE ENVIRONMENTAL COMPLIANCE AT THESE FEDERAL FACILITIES. IT HAS BEEN A LONG AND ARDUOUS PROCESS AND WHILE SOME PROGRESS IS NOW BEING MADE THERE IS STILL SIGNIFICANT NON-COMPLIANCE AT BOTH FACILITIES.

IN COLORADO, WE HAVE ATTEMPTED TO ENFORCE THE STATE HAZARDOUS WASTE MANAGEMENT ACT AT THE ROCKY FLATS PLANT AND ROCKY MOUNTAIN ARSENAL THROUGH SEVERAL COMPLIANCE ACTIONS SINCE THE MID-80'S. OUR EFFORTS HAVE BEEN HINDERED BY THE LACK OF CLEAR PENALTY POWERS. WE WERE ALSO STYMIED FOR YEARS BY FEDERAL AGENCIES EFFORTS TO AVOID REGULATION OF SOME HIGHLY TOXIC WASTE STREAMS USING VARIOUS LEGAL THEORIES.

FOR INSTANCE, THE MAGNITUDE OF VIOLATIONS AND NON-COMPLIANCE AT THE ROCKY FLATS PLANT IN THE MID-80'S WOULD HAVE LIKELY RESULTED IN SUBSTANTIAL PENALTIES UNDER OUR HAZARDOUS WASTE LAWS. PERHAPS SUCH PENALTIES WOULD HAVE ATTRACTED ENOUGH ATTENTION OF THE LAWMAKERS AND BUDGET WRITERS SEVERAL YEARS BEFORE THE FBI NEEDED TO RAID THE PLANT, AS THEY DID LAST SUMMER.

PERHAPS SUCH PENALTIES WOULD HAVE FORCED THE MANAGERS OF DOE TO TAKE SERIOUSLY COMPLIANCE WITH STATE AND FEDERAL ENVIRONMENTAL LAWS SEVERAL YEARS AGO. IF SO, CLEANUP AND PROPER MANAGEMENT OF THE HAZARDOUS AND RADIOACTIVE WASTES AT THE PLANT WOULD BE MUCH FURTHER ALONG THAN IT IS TODAY. WHILE WE HAVE BEEN SUCCESSFUL IN REACHING SETTLEMENTS ON A NUMBER OF VIOLATIONS OUR ABILITY TO DO SO WOULD HAVE BEEN SUBSTANTIALLY ENHANCED IF THE ENFORCEMENT AND PENALTY AUTHORITY HAD BEEN CLEARER.

THE SAME IS TRUE AT NUMEROUS FEDERAL FACILITIES THROUGHOUT THE COUNTRY. AS YOU CAN SEE FROM THE ILLUSTRATION ON THE COVER OF THE NGA/NAAG FEDERAL FACILITIES REPORT THE NATION IS DOTTED WITH NUMEROUS FEDERAL INSTALLATIONS WITH SERIOUS ENVIRONMENTAL CONTAMINATION PROBLEMS. STATES THROUGHOUT OUR LAND HAVE BEEN STRUGGLING TO FORCE FEDERAL AGENCIES TO CLEAN UP THE CONTAMINATION AND MANAGE THEIR HAZARDOUS AND RADIOACTIVE WASTES RESPONSIBLY. IT WAS BECAUSE OF OUR COLLECTIVE STRUGGLES THAT NGA AND NAAG COMMISSIONED THIS REPORT AND ADOPTED ITS RECOMMENDATIONS EARLIER THIS YEAR.

THERE ARE FIVE MAJOR RECOMMENDATIONS IN THE REPORT WHICH ARE SUMMARIZED ON PAGES VI and VII OF THE EXECUTIVE SUMMARY. I WOULD LIKE TO HIGHLIGHT THE FIRST TWO SINCE THEY ARE DIRECTLY RELEVANT TO YOUR PROCEEDINGS TODAY.

FIRST, WE BELIEVE THAT SIGNIFICANT IMPROVEMENTS IN ENVIRONMENTAL COMPLIANCE AT FEDERAL FACILITIES IS CRUCIAL IF WE ARE TO HAVE A CREDIBLE ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT PROGRAM IN THIS COUNTRY. SECOND, IT IS ESSENTIAL THAT INDEPENDENT OVERSIGHT BY THE STATES AND EPA NEEDS TO BE ESTABLISHED OVER DOE, DOD AND OTHER FEDERAL AGENCIES WITH ENVIRONMENTAL CONTAMINATION PROBLEMS.

WHILE CONGRESS HAS WISELY PROVIDED THE POLICY DIRECTION THAT FEDERAL AGENCIES ARE SUPPOSED TO COMPLY WITH FEDERAL AND STATE ENVIRONMENTAL LAWS TO THE SAME EXTENT AS PRIVATE FACILITIES THE TRACK RECORD OF THE FEDERAL AGENCIES HAS BEEN POOR IN ACHIEVING COMPLIANCE AND THE FEDERAL AGENCIES HAVE

FOUGHT APPLICATION OF OUR ENFORCEMENT POWERS EVERY STEP OF THE WAY.

OUR ABILITY TO FORCE THE FEDERAL AGENCIES TO COMPLY HAS BEEN COMPLICATED BY THE JUSTICE DEPARTMENT'S "UNITARY THEORY OF THE EXECUTIVE" AND "SOVEREIGN IMMUNITY" WAIVERS. THEY HAVE ATTEMPTED TO LIMIT NOT ONLY STATE AUTHORITIES BUT ALSO EPA'S ENFORCEMENT POWERS AGAINST SISTER AGENCIES IN THE SO CALLED FEDERAL FAMILY. WHILE WE BELIEVE THAT RCRA 6001 ALREADY WAIVES SOVEREIGN IMMUNITY SOME COURTS HAVE UPHELD THE JUSTICE DEPARTMENT'S THEORIES. THIS MUST BE FIXED. THE FEDERAL GOVERNMENT NEEDS TO BE LEADING THE WAY AND SETTING THE PACE ON ENVIRONMENTAL COMPLIANCE, NOT DRAGGING ITS FEET AND FINDING LEGAL THEORIES TO THROW IN THE WAY OF EPA AND STATE ENVIRONMENTAL AGENCIES.

THAT IS WHY ONE OF THE SPECIFIC RECOMMENDATIONS OF THE GOVERNOR'S IS FOR CONGRESS TO FURTHER CLARIFY ITS INTENTION IN SECTION 6001 OF RCRA TO WAIVE SOVEREIGN IMMUNITY FOR FEDERAL AGENCIES WHEN IT COMES TO APPLICATION AND ENFORCEMENT OF FEDERAL AND STATE ENVIRONMENTAL LAWS. FULL ENFORCEMENT MEANS THE ABILITY FOR THE STATES AND EPA TO SEEK AND IMPOSE THE COMPLETE RANGE OF SANCTIONS AND PENALTIES FOR NON-COMPLIANCE AS ARE AVAILABLE AGAINST PRIVATE FACILITIES. EQUITY DEMANDS THAT WE ACHIEVE THE SAME LEVEL OF PERFORMANCE FROM OUR GOVERNMENT AGENCIES AS WE INSIST UPON FROM PRIVATE COMPANIES.

IN ORDER TO ACHIEVE THE SIGNIFICANT IMPROVEMENTS IN FEDERAL FACILITIES COMPLIANCE WE NEED TO MOVE AWAY FROM THE SELF-REGULATING AND SELF-ENFORCING APPROACH THAT THE FEDERAL AGENCIES HAVE SUSTAINED FOR TOO LONG. WE NEED TO GIVE A CLEAR AND UNEQUIVOCAL DIRECTION TO THESE AGENCIES AND THE DEPARTMENT OF JUSTICE THAT EPA AND THE STATE'S ARE FULLY EMPOWERED TO ENFORCE THE ENVIRONMENTAL LAWS AT THESE SITES.

S. 1140 PROVIDES CLEAR DIRECTION ABOUT THE SOVEREIGN IMMUNITY WAIVER IN RCRA BY SPECIFYING THAT THE FEDERAL AGENCIES ARE SUBJECT TO ORDERS, FINES, PENALTIES AND OTHER SANCTIONS. WE SUPPORT ITS PASSAGE AND URGE YOU TO OPPOSE ANY WEAKENING AMENDMENTS.

AS YOU WILL SEE IN THE REPORT THERE ARE MANY ADDITIONAL RECOMMENDATIONS WE ARE OFFERING TO ADDRESS FEDERAL FACILITY PROBLEMS BUT WE WILL LEAVE DISCUSSION OF THOSE TO THE RCRA AND SARA REAUTHORIZATION PROCESSES.

CLEAR REMOVAL OF THE SOVEREIGN IMMUNITY WAIVER WILL STIMULATE FASTER COMPLIANCE WITH OUR ENVIRONMENTAL LAWS AND WILL ACT AS A SIGNIFICANT DETERRANT TO FUTURE VIOLATIONS IN COLORADO AND THROUGHOUT THE COUNTRY. THE UNFETTERED ABILITY TO USE THESE POWERS HAS WORKED WELL AT NUMEROUS PRIVATE SITES. WE FULLY EXPECT THE SAME WILL HOLD TRUE AT FEDERAL SITES ONCE THIS ISSUE IS CLARIFIED AND CONGRESS PROVIDES EXPLICIT DIRECTION TO THE FEDERAL AGENCIES THAT CONTINUED NON-COMPLIANCE IS NO LONGER ACCEPTABLE TO THE PEOPLE OF THIS COUNTRY.

THANK YOU.

Department of Justice

TESTIMONY

OF

RICHARD B. STEWART
ASSISTANT ATTORNEY GENERAL
ENVIRONMENT & NATURAL RESOURCES DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

CONCERNING

S. 1140, THE FEDERAL FACILITY COMPLIANCE ACT OF 1989

MAY 2, 1990

Mr. Chairman and members of the Committee:

Good morning. I am Richard B. Stewart, the Assistant Attorney General in charge of the Justice Department's Environment and Natural Resources Division (formerly the Land and Natural Resources Division). I am pleased to have this opportunity to appear before the Committee on behalf of the Department to discuss S. 1140, a bill that deals with the important issue of environmental compliance at federal facilities.

Mr. Chairman, for many months now, various agencies within the Executive Branch have been working on possible solutions to address the issues which have been raised. We are now convinced that utilizing the basic framework of S. 1140, we can sit down with you and the members of the Committee to finalize legislation which will result in a realistic national strategy for dealing with the environmental concerns at federal facilities and will greatly enhance the ability of states and others to take action against agencies which fail to comply with the law. Today, I would like to discuss the issues, and suggest that representatives of the Administration meet with your staff as soon as possible to discuss in detail specific concepts which we believe will result in a bill which will be effective and acceptable to all concerned.

Mr. Chairman, as you know, the House of Representatives last summer passed a bill, H.R. 1056, that includes many of the same provisions as S. 1140. The Administration opposed H.R. 1056. Although we strongly supported the underlying goal of the bill, and there were a number of changes made to the bill in response to Administration comments, we found that problems nevertheless remained. The changes we suggested are discussed in a letter, dated June 19, 1989, from the Department to House Energy and Commerce Committee Chairman John D. Dingell. I have attached a copy of the letter to this testimony, and I request that it be included in the record of this hearing. I will not discuss those changes further here, except to note that most of them are reflected in S. 1140.

A key problem that we identified in H.R. 1056, and which was not corrected, is that the bill fails to expressly distinguish between penalties for on-going compliance violations and penalties for failure to undertake cleanup of past contamination. Unfortunately, S. 1140 also fails to make this distinction.

The Administration would like to work with the Committee to develop an amendment to S. 1140 that will make a clear distinction between cleanup and compliance and address other concerns while still preserving the goals of the bill. In my testimony, I will discuss the cleanup/compliance distinction and why it is so important, and the basic outlines of the Administration proposal. But first I would like to take a few moments to address the current state of the law with respect to the RCRA waiver of sovereign immunity.

Mr. Chairman, I think it is fair to say that some of the House debate on H.R. 1056 reflected confusion regarding the current state of the law and the ways H.R. 1056 would change the law. Indeed, anyone who listened to the floor debate might very well think that the question before the House was whether federal facilities should be subject to hazardous waste laws. Since this confusion concerns key provisions on sovereign immunity that are common to both H.R. 1056 and S. 1140, I think it is very important to clarify these issues.

The issue raised by the sovereign immunity provisions of H.R. 1056 and S. 1140 is not whether federal facilities should be subject to hazardous waste laws. Federal facilities already are subject to such laws. Section 6001 of the Resource Conservation and Recovery Act ("RCRA") very clearly and explicitly states that federal facilities "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal."1/

1/ The complete first sentence of Section 6001 reads as follows:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

RCRA § 6001, 42 U.S.C. § 6961.

Furthermore, federal agencies have for the past several years been working hard to ensure that their facilities comply with these requirements. Federal agencies currently are required to operate -- and do operate -- hazardous waste facilities in accordance with RCRA's requirements for interim status and permits. This includes compliance with requirements of both EPA and the authorized states. Federal agencies have applied for and received RCRA permits from authorized states. Federal agencies must be -- and are -- inspected by RCRA-authorized states.

If a facility fails to comply, states and citizens can -- and do -- take enforcement action, including actions under the citizen suit provisions of RCRA and under applicable state laws. DOE and DOD have entered into a number of agreements with states addressing noncompliance and corrective action at particular facilities. For example, the Department of Energy and the State of Washington have agreed to clean up provisions for DOE's Hanford facility, including RCRA closure of certain units. Department of Defense components have also entered such agreements, an example being the Air Force and the State of Georgia agreement governing Robins Air Force Base. Similarly, other federal agencies resolve non-compliance in this fashion, such as the Department of Agriculture agreement with Maryland governing RCRA operational issues at its Beltsville Agricultural Research Center. These agreements are legally binding on the federal government and fully enforceable by the states and third parties.

Thus, the federal government's basic obligation to comply with federal, state, interstate and local solid and hazardous waste laws is not at issue. S. 1140 would not change existing law with respect to this obligation, and no such change is necessary, since current law is already quite clear on this point.

S. 1140 _would_ make a change with respect to the much narrower question of the immunity of the federal government from civil penalties for violations of federal, state, interstate or local requirements respecting control and abatement of solid waste or hazardous waste disposal. S. 1140 contains a clear and effective waiver of the sovereign immunity of the United States from civil and administrative penalties for violations of such requirements. As a result, the states' current ability to enforce requirements would be augmented with the ability to assess penalties for violations of those requirements. This is a significant change from current law,2/ with important policy

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2/ The Ninth Circuit and five federal district courts have found that RCRA does not waive the government's immunity for penalties. _United States v. Washington_, 872 F.2d 874 (9th Cir. 1989), aff'g, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,363 (E.D. Wash. 1988); _California v. U.S. Department of Defense_, 18 Envtl. L. Rep. (Envtl. L. Inst.) 21,023 (E.D. Cal. 1988), aff'd, No. 88-2912 (9th Cir. June 26, 1989) (unpublished order); _Mitzelfelt v. Department of the Air Force_, No. 88-1535-M Civil (D.N.M. July 14, 1989) (unpublished order), appeal pending No. 89-2223 (10th Cir.); _Meyer v. United States Coast Guard_, 644 F. Supp. 221 (E.D. N.C. 1986); _McClellan Ecological Seepage Situation v. Weinberger_, 655 F. Supp. 601 (E.D. Cal. 1986). Two district courts have taken the contrary view. _Maine v. Department of the Navy_, 702 F. Supp. 322 (D. Me. 1988); _Ohio v. U.S. Department of Energy_, 689 F. Supp. 760 (S.D. Ohio 1988), appeal docketed, No. 89-3329 (6th Cir. April 20, 1989).

implications, but it is a much narrower question than whether federal facilities must comply with such requirements.[3]

Let me turn now to those policy implications. The Department of Justice generally defers to the affected federal agencies as to whether, as a matter of policy, a particular waiver of sovereign immunity is desirable, but in the case of S. 1140, the waiver of sovereign immunity for penalties raises particular concerns that make comment by the Justice Department appropriate.

The waiver of sovereign immunity for penalties in S. 1140 is sweeping. It does not distinguish between penalties for on-going compliance violations, and penalties for failure to clean up past contamination through corrective action (see RCRA §§ 3004(u) and 3008(h)) and certain major closures, which may involve substantial expenditures for which the federal agencies involved may lack budget authority. This broad waiver appears to reflect a policy preference for a greater emphasis on enforcement as a tool for improving environmental compliance at federal facilities. It is the failure to distinguish these two very different types of situations that is the core of our concern with S. 1140.

As the person with responsibility for overseeing all of the federal government's environmental compliance litigation, I can assure you that vigorous enforcement -- both civil and criminal -- is a key component in achieving ongoing compliance with environmental laws. But in the case of federal facilities, enforcement by states and private litigants is not a satisfactory mechanism for addressing cleanups of past contamination. Such cleanups often take a long period of time and involve massive federal expenditures. Those cleanups should be addressed under a comprehensive system of environmental planning and funding priorities established by the Administration and Congress in consultation with the States, not through piecemeal litigation. Indeed, the undifferentiated waiver of penalty immunity in S. 1140 may skew federal facility cleanup priorities and interfere with the budget process by creating an incentive for states to seek penalties and for federal agencies to embark on cleanups irrespective of the relative risks to human health and the environment posed by different federal facilities. Federal agencies, motivated by the threat of penalties, may be forced to devote their limited cleanup resources to reducing their penalty exposure, based on which states and private parties are most aggressive in litigation, rather than cleaning up the worst sites first. In fact, the bill would appear to permit a state to penalize a federal agency for not taking corrective action even where Congress has denied the agency's specific request for funding to take that action.

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[3] An additional result of the waiver would be to authorize courts to assess penalties against the United States in citizen suits brought under RCRA § 7002. Such penalties would be payable to the U.S. Treasury.

For several months the Administration has been discussing ways to address these concerns, and we would like to work with the Committee to distill these concerns further into an amendment to S. 1140. We envision this amendment would require EPA and the federal agencies, in consultation with the states where federal facilities are located, to develop a method for setting priorities among cleanup actions at federal facilities. EPA would then report back to the Congress on the results of this consultative process, and make recommendations for any appropriate additional legislation on this issue. I would note that this approach is consistent with the resolution on federal facilities environmental compliance adopted by the National Association of Attorneys General at their March 1990 meeting.

In addition, the amendment would modify the sweeping waiver of sovereign immunity for penalties currently provided in S. 1140 to allow the imposition of fines and penalties for noncompliance that occurs after enactment but not for RCRA corrective actions and large-scale closures. This will help ensure that fines and penalties do not set our cleanup priorities. The amendment would also provide that funds collected by a state from the federal government as a fine or penalty under the revised waiver of sovereign immunity would be used for environmental purposes. This provision, contained in H.R. 1056, would help ensure that states use the expanded sovereign immunity waiver for the intended purpose -- as a tool for improving environmental compliance at federal facilities -- and not simply as a means of raising revenue.

In closing, Mr. Chairman, I would like to stress that the Administration shares the Committee's goal of ensuring that all federal facilities reach and maintain full environmental compliance as expeditiously as possible. We look forward to working with you to address the concerns I have just described, and to ensure that S. 1140 will help the federal government to achieve that important goal.

I will be happy to answer any questions you may have.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 19 1989

Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter sets out the views of the Department of Justice on the amended version of H.R. 1056, a bill to amend the waiver of sovereign immunity provision in the Resource Conservation and Recovery Act ("RCRA"). The Transportation and Hazardous Waste Subcommittee reported out the amended bill following its May 23, 1989, mark-up.

The amended bill corrects several of the problems identified in Acting Assistant Attorney General Donald A. Carr's testimony at the April 12, 1989, Subcommittee hearing on the original bill. It expressly protects officers, agents, and employees of the United States from personal liability for civil penalties for acts or omissions within the scope of their official duties. At the same time, the amended bill provides that the departments, agencies and instrumentalities of the federal government are not subject to federal or state criminal sanctions.[1] These changes are important improvements in the bill.

In addition, the amended bill provides that administrative orders issued by EPA to another agency shall not become final until the agency has an opportunity to confer with the Administrator. It also removes the requirement that federal facilities be treated in exactly the same manner as all other facilities. These changes address our constitutional objections to the purported unilateral administrative order authority in the original bill. As a practical matter, the requirement for consultation between interested agencies allows the President to set up whatever interagency dispute resolution process he chooses, and nothing in the bill now precludes the President from establishing such a review process.

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[1] The amended bill also includes an express statement that agents, employees and officers of the United States are subject to criminal sanctions for violations of state or federal solid and hazardous waste laws. We agree that federal employees should not be immune from such sanctions, but view this provision as unnecessary. Federal employees are already subject to such criminal sanctions, because they are covered by the RCRA definition of "person." Since the other federal environmental statutes do not contain such express language, the addition of this provision could have the unintended effect of casting doubt on whether federal employees are subject to criminal sanctions under the other statutes. Accordingly, this provision should be dropped from the bill.

A significant problem we identified in the original bill remains uncorrected, however. Like the original bill, the amended bill fails to expressly distinguish between penalties for on-going compliance violations and penalties for failure to undertake corrective action. We view this as a major defect. As Mr. Carr pointed out in his testimony to the Subcommittee, the bill would appear to permit a state to penalize a federal agency for not taking a corrective action even where Congress has denied the agency's specific request for funding to take that action. We continue to be concerned that the waiver of immunity from penalties for failure to undertake corrective action (which may involve substantial unbudgeted expenditures) may skew federal facility cleanup priorities and interfere with the budget process.

An amendment was offered at Subcommittee mark-up that would have made this distinction, and we understand that a similar amendment will be offered at the full Committee level. If the bill is amended to limit the application of penalties to on-going non-compliance (as opposed to cleanup and closure activities), that would remove our last major objection to the bill. Notwithstanding the useful changes made by the Subcommittee, the Department of Justice continues to oppose H.R. 1056 unless it is amended accordingly.

In addition, we continue to have reservations about the waiver of immunity from local and administrative penalties since fewer procedural protections normally accompany such penalties than those assessed by a state. We would encourage the Committee to reconsider whether federal agencies should be subject to such local administrative authorities.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Assistant Attorney General

cc Rep. Norman F. Lent
Rep. Thomas A. Luken
Rep. Bob Whittaker
Rep. Dennis E. Eckart
Rep. Alex McMillan

STATEMENT OF
STEPHEN A. WAKEFIELD
GENERAL COUNSEL OF
DEPARTMENT OF ENERGY

BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
OF THE
UNITED STATES SENATE

MAY 2, 1990

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I. Introduction

I appreciate this opportunity to discuss with you today the Department of Energy's views on S.1140. Let me first say that the Department fully supports the underlying goal of S.1140, which is to bring Federal facilities into compliance with applicable Federal and State environmental laws. The Department recognizes that its facilities must comply with Federal and State environmental laws. Bringing all DOE facilities into compliance with Federal and State environmental laws as rapidly as possible is one of Admiral Watkins' top priorities.

I would like to emphasize at the outset that the Department unquestionably recognizes that the Resource Conservation and Recovery Act (RCRA) applies to its facilities. The Department's obligation to comply with RCRA is not an issue. Instead, the issue raised by S.1140 is the more narrow question of immunity of the Federal government from civil penalties assessed by States for violations of RCRA. The Department recognizes that in order to resolve its environmental problems, the States must play an important role. To the extent S.1140 brings the States more into the process, we find S.1140 helpful. While fines and penalties are an important tool to ensure environmental compliance, we must all recognize, however, that they are but one of several tools that should be used in a coordinated effort to comply with environmental laws and clean up waste problems. If taken alone, fines and penalties may be a blunt instrument which could be counterproductive to our cleanup efforts. We must make certain, Mr. Chairman, that the Federal Government cleans up its worst environmental problems first. To that end, we must establish cleanup priorities and allocate resources in a rational, orderly, and coordinated manner.

II. Federal Facilities Compliance

Inasmuch as a major thrust of S.1140 deals with the Department of Energy's compliance with environmental laws, it would be useful to preface my comments with a review of DOE's present compliance and cleanup efforts. The waste generated over the past 40 years by DOE's defense production facilities has left us with serious environmental problems. Previous management practices which were driven by the national defense and security mission often did not anticipate or respond adequately to new environmental laws and regulations, and did not necessarily reflect an adequate concern for the environment. Mr. Chairman, I know this committee is familiar with Admiral Watkins' many efforts to turn the DOE management culture around and to send a strong, clear message that our defense production facilities can and must be run in an environmentally safe manner. Among these efforts is the Department's Five Year Plan for environmental restoration and waste management. The Five Year Plan, developed with broad participation by State and Indian Tribal representatives, affected Federal agencies, and interested public organizations, begins the process of addressing environmental requirements in a unified, prioritized, and coordinated fashion by examining projected actions and expenditures over a five year period. With full and continued public comment by all interested parties, it will be updated on an annual basis. The Department's Five Year Plan identifies initiatives that must be undertaken if the environmental problems at our facilities are to be addressed adequately. It provides the foundation and forms a rational basis for evaluating competing projects so that Federal funds and other resources can be allocated to those areas that pose the most pressing problems and are the most in need of immediate action.

Other efforts designed to remedy the Department's environmental problems include implementing the Admiral's Ten Point Plan initiatives; employing "Tiger Teams" (which conduct environmental, health and safety audits at all DOE facilities); significantly revising our NEPA Policy and procedures; establishing the new Office of Nuclear Safety; recommending a new post of Assistant Secretary for Environmental Restoration and Waste Management; strengthening line management and accountability; enhancing external and internal oversights; reforming our contractors' award fee system to emphasize environmental compliance over production; and conducting an ongoing review of other management and operating contract provisions. These efforts to reshape the DOE management culture are having an immediate, dramatic, and positive impact and are a direct result of Admiral Watkins' priority of bringing all DOE facilities into compliance with Federal and State environmental laws as rapidly as possible.

In order to place the Department's compliance and cleanup issues in context, let me review how DOE got to its present state. Although RCRA was enacted by Congress in 1976, judicial determination of its applicability to DOE facilities was not made until 1984, and the coverage of all DOE radioactive waste under RCRA was clarified by the Department's "by-product" rule in 1987. Since 1984, however, DOE has entered into 24 compliance agreements with either EPA or the appropriate State environmental authorities, or both, to bring its facilities into compliance with RCRA. Specifically, we have entered into compliance agreements for our facilities at such locations as Savannah River, Hanford, Rocky Flats, INEL, Portsmouth Gaseous Diffusion Plant, and the Feed Materials Production Center. These compliance agreements identify findings of noncompliance at the facilities and set schedules for taking corrective or cleanup actions. In addition to these completed agreements, we are negotiating currently 27 compliance and cleanup agreements, many of which involve RCRA.

While we are making substantial progress in entering into these compliance and cleanup agreements, we do have some concerns in this area.

First, the sheer magnitude of the waste cleanup problem with its technical and financial implications, is of substantial concern to us, the States and the Congress. It is incumbent upon all interested parties to distinguish DOE's compliance problems from it waste cleanup problems. Our initiatives and cultural changes are designed to ensure that DOE facilities comply with environmental laws and immediately correct any violations that may occur. Waste cleanup, on the other hand, requires long-term planning, implementation and funding. It also requires significant development of technologies presently not in existence. As a result, because we have so many complex and difficult environmental cleanup problems at our facilities which require significant planning and resources to correct, we must develop a strategy to address these cleanup problems in an orderly and comprehensive manner. Stated simply, it is technically and financially impossible to clean up immediately the materials generated during 40 years of production and wasteful to try to do so without establishing national priorities to ensure that the most serious problems are addressed first. Attempting to solve problems piecemeal actually may result in impeding cleanup. The purpose of the Department's Five Year Plan is to establish the relative priorities of sites by continuing investigation and dialogue on environmental and health effects and sociological impacts. Examining our environmental problems in a unified manner, taking into account national concerns and our obligations to comply with environmental law, is the only effective and efficient way to resolve those problems. I urge that this committee consider this type of long-range planning so that we may be assured of prompt implementation of rational and orderly national environmental compliance and cleanup strategy.

In granting States the authority to impose fines and penalties, as S.1140 does, we must be careful, Mr. Chairman, not to allow priorities to be determined on any basis other than cleaning up the most serious problems first. We also must ensure that fines and penalties do not impede our cleanup efforts by diverting funds from accounts that would otherwise be used to clean up facilities. The process for spending Federal funds responsibly and marshalling other resources, such as trained manpower, and developing technology on environmental restoration, should not be based in any way on the comparative aggressiveness of States or the comparative complexity or simplicity of State administrative procedures. Prioritization must be based on a rational procedure having a national perspective. We believe that the best course of action would be to establish priorities in a way that will accomplish the most good for the public health and the Nation as a whole. Accordingly, the Department believes that S.1140 should be amended to include a prioritization process whereby the Nation addresses its worst environmental problems first. Such a prioritization must include the States as key players. To ensure that the prioritization process is not impeded, the Department believes that sovereign immunity should not be waived for fines and penalties regarding clean up violations until the prioritization process is in place. Once the prioritization process is in place and Federal agencies are working within that framework, then it would be appropriate to waive sovereign immunity for actions which violate that process.

Second, for the compliance and cleanup agreements to be truly effective they must identify and then address all of the environmental problems at a facility. To achieve this objective, DOE and its employees and contractors should be encouraged to seek out and to disclose this information. We need to make clear to our employees and contractors that prompt, good faith efforts to disclose environmental problems and to move promptly toward compliance with environmental laws through compliance agreements are the goals of our new management culture and that these efforts will not put those acting in good faith in jeopardy.

Third, as I stated earlier, the Department supports the concept of S.1140 to the extent it promotes compliance with environmental laws. With that in mind, we believe that any waiver of sovereign immunity should be prospective, since imposition of fines and penalties for retroactive transgressions does not promote the process of getting into compliance.

Finally, the Department believes S.1140 should be amended to provide that, unless a State constitution requires funds to be used in a different manner, all funds collected by a State from the Federal Government as a fine or penalty for an environmental violation must be used only for environmental purposes. This provision, which is in H.R.1056, would help ensure that fines and penalties are used constructively to improve the environment.

III. CONCLUSION

The Department is committed firmly to having our nuclear defense production facilities comply with all applicable environmental laws. The Department also is convinced of the value of oversight by affected States and EPA. Solving the Department's waste problems will require long-term planning, a national prioritization system, the development of new and cost-effective technology, and the mutual cooperation of Federal and State agencies. We would like to work with the committee to incorporate the above items into S.1140.

STATEMENT OF
JAMES M. STROCK
ASSISTANT ADMINISTRATOR
OFFICE OF ENFORCEMENT
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

MAY 2, 1990

Good morning, Mr. Chairman and Members of the Committee. Thank you for the opportunity to be here today to discuss Federal facilities compliance with the Resource Conservation and Recovery Act (RCRA), and to discuss S. 1140, a bill intended to clarify the waiver of sovereign immunity under RCRA. With me today is Christopher Grundler, Director of the Office of Federal Facilities Enforcement.

I would like to begin by stating that Administrator Reilly is deeply concerned about Federal facilities' compliance with environmental laws and regulations, and is committed to improving Federal facilities' compliance with RCRA. As the President has stated, the Federal Government should "live within the laws it imposes on others".

As EPA has stated in the past, we support the purpose and objectives behind S. 1140. We want to work with you to make modifications to the proposal to allow it to better accomplish its purpose and objectives. We have several comments which we would like to share with the committee.

Before sharing our comments on the bill as currently drafted, it is important to distinguish the two types of hazardous waste problems typically encountered at Federal facilities, and the approaches EPA uses to address them. Hazardous waste problems at Federal facilities generally fall into two categories: compliance and cleanup. Compliance problems refer to violations of those requirements applying to the generation, treatment, storage, or disposal of hazardous waste (e.g., requirements for inspection, container integrity and storage, waste analysis, manifesting, labelling, groundwater monitoring, etc.). Cleanup problems refer to the response activities necessary to address releases of hazardous wastes or hazardous substances which have resulted from past practices.

The approach EPA now uses to enforce RCRA requirements at Federal facilities is as follows. Because section 6001 of RCRA does not allow EPA to issue administrative compliance orders to other Federal agencies for violations of RCRA, EPA developed a process for resolving compliance matters which parallels the process we use at private facilities. This process was issued as Agency policy in January, 1988. Upon discovering a violation at a Federal facility which, under EPA's Enforcement Response Policy, requires a formal enforcement response, EPA issues a "Notice of Noncompliance " as our initial enforcement action. This notice is the equivalent in content and form to a RCRA 3008(a) administrative complaint, which EPA issues to private facilities as our initial enforcement action. The notice specifies the violations discovered at the facility, actions needed to bring the facility back into compliance, and timeframes for implementing the specified actions.

Following the issuance of the notice of noncompliance, EPA then begins to negotiate what is known as a "Federal Facilities Compliance Agreement", which is a formal commitment on the part of the Federal facility to perform all actions necessary for a facility to return to compliance. This agreement is in lieu of an administrative order on consent, which is negotiated at private facilities. Two key provisions in such Federal facilities agreements are those relating to enforceability and dispute resolution. The enforceability provision guarantees that the terms of the agreement are enforceable by both states and citizens, pursuant to RCRA section 7002. The dispute resolution provision assures that any dispute arising under the agreement will be systematically elevated up the EPA management chain, with the Agency's Administrator making the final decision, if necessary.

In an effort to improve the efficacy of this process, in March of 1988 EPA issued a directive requiring EPA Regional offices to elevate compliance disputes to EPA Headquarters where they were unable to reach compliance agreements with Federal facilities within 90 to 120 days of issuance of a notice of noncompliance. In addition, EPA Regions are required to establish deadlines for negotiations in the notices of noncompliance themselves, and to provide notice to the facility that if no agreement is reached within 90-120 days, the matter will be referred to EPA Headquarters.

EPA has also exercised its authority to initiate enforcement actions against contractor-operators at government-owned facilities (also known as "GOCOs"). Sovereign immunity does not extend to GOCOs, and EPA uses this authority to enforce RCRA requirements at Federal facilities. EPA believes that where a contractor is operating a government facility and is responsible for the day-to-day management of hazardous wastes at that facility, it is entirely appropriate for EPA to hold that contractor accountable for violations of environmental law, and to assess appropriate penalties for those violations. EPA has taken such action at a number of Federal facilities, most recently against Westinghouse at the Department of Energy's Feed Materials Production Center near Fernald, Ohio. EPA and the other Federal agencies agree that no one is entitled to a license to pollute simply by virtue of having a contract with the Federal government.

EPA is continuing to emphasize GOCO enforcement actions in its operating guidance to the EPA Regional offices, and is in the process of developing a GOCO Enforcement Strategy for Federal facilities which would apply to enforcement actions under all environmental laws.

EPA has also not hesitated to pursue criminal enforcement at Federal facilities in appropriate circumstances. As Deputy Administrator Habicht and I have stated before this committee, there can be no question that criminal enforcement is our most potent compliance tool. The convictions under RCRA at the Aberdeen facility have sent a shock wave through the Federal government about the importance and duty to comply with environmental laws. EPA and the Department of Justice have also made public the search warrants executed at the DOE Rocky Flats and Fernald plants, and at Vance Air Force Base in Oklahoma.

Cleanup problems at Federal facilities are addressed using several mechanisms. If a facility has been listed on the National Priorities List established under Superfund, EPA generally negotiates a three-party agreement (EPA, Federal Agency, and affected state) under the authority of section 120 of CERCLA. These agreements represent binding, enforceable commitments on the part of the Federal agency to address the releases of hazardous substances at the facility, and to do so under the supervision and of EPA and the state. The agreements, also known as interagency agreements or "IAGs", provide for enforcement by the parties and citizens, stipulated penalties for failure to comply with the schedule or terms of the cleanup, and funding and dispute resolution procedures. In addition, the agreements provide a means to integrate the facilities' cleanup obligations under Superfund with its cleanup obligations under RCRA.

Substantial progress has been made in completing these agreements and moving forward with cleanup activities at NPL facilities. We have signed comprehensive agreements covering 50 of the 115 Federal facilities on the NPL. There are approximately 50 negotiations underway, and we hope to have all current Federal facilities on the NPL under agreement by sometime in Fiscal Year 1991.

Cleanup activities may also be regulated under RCRA through permit conditions requiring corrective action (RCRA 3004(u) and 3004(v)), or through corrective action orders under 3008(h). EPA has negotiated and signed seven 3008(h) orders to date, and issued 134 final RCRA permits requiring corrective action activities (e.g. RCRA facilities investigations) at Federal facilities.

Finally, if a Federal facility is not on the NPL and is not regulated under RCRA, CERCLA section 120 provides that state laws concerning removal and remedial actions shall apply.

Now I would like to turn to EPA's specific comments on S.1140.

Section 2 requires each Federal facility to perform an assessment of releases of hazardous substances from each solid waste management unit at each Federal treatment, storage, or disposal facility (TSD) owned or operated after November, 1980. The assessments must be completed within 12 months and must indicate the compliance status of the facility under the major federal environmental statutes.

EPA believes that including an environmental auditing provision in S. 1140 is an improvement over similar legislation passed by the House. Many major corporations conduct environmental audits of its facilities or the facilities with which it does business, and the government should, too. EPA has been promoting the use of environmental audits at both public and private facilities, and believes that it should be a part of standard practice. Environmental audits not only point out potential compliance problems, but can also identify ways to improve operations, seek out the root causes of noncompliance, and identify ways to prevent pollution. In fact, the Energy Department is currently establishing a centralized audit program, and there are various efforts underway already within the Defense Department and military services.

This section could be significantly improved, however, by broadening its scope to include not just RCRA TSD's, but all environmentally-significant facilities. In addition, the timeframe of 12 months to establish such a program and to complete all of the assessments seems to be very optimistic. EPA defers to the other agencies, however, on appropriate timeframes to establish environmental auditing programs within their agencies.

Section 2 also requires EPA to conduct annual inspections at each Federal facility. Each inspection is to enforce compliance with each of the major environmental statutes, and each inspection shall include a comprehensive groundwater monitoring evaluation.

A requirement for EPA to conduct an annual inspection currently exists for all Federal facilities regulated under RCRA. Expanding this requirement to all Federal facilities, and for all major environmental statutes, has major resource implications for the Agency, and might interfere with states' obligations to conduct such inspections. Most inspections under statutes other than RCRA are currently conducted by states under delegated programs. The requirements for a groundwater monitoring inspection should be limited to those facilities regulated under RCRA. In addition, this section is currently drafted to require an inspection at every Federal facility for every environmental law, regardless of whether the facility has any environmental significance (i.e., many Federal "facilities" are simply buildings). Similarly, this section requires a groundwater monitoring inspection at each facility.

For the reasons stated above, EPA recommends that the Committee refine the scope of this section to those facilities which fall under the jurisdiction of the various environmental statutes, and those facilities which maybe otherwise environmentally significant. In addition, EPA must first analyze the resource implications of an annual, multi-media inspection program before we are able to support this provision. Also, we believe that this provision should recognize that States are authorized to perform many of these inspections.

Section 3 amends RCRA section 6001 to clarify that the waiver of sovereign immunity extends to state administrative fines and penalties for failure to comply with applicable requirements of RCRA. It further provides authority to the EPA Administrator to issue administrative orders to Federal facilities to enforce the requirements of RCRA.

Starting with the statement by the President, and the actions and policies of Secretary Watkins and Secretary Cheney, there should be no doubt of the firm commitment of this Administration to compliance with environmental laws by Federal facilities. Both the Defense Department and the Energy Department have said that compliance with environmental laws is their number one priority, and that national security and environmental security are not mutually exclusive. Indeed, the Administration has said that the Federal government should be a leader and set the example for the rest of the regulated community.

Through legislation such as the bill before this committee and the bill which has passed the House, Congress is also expressing the view of the public that Federal facilities' compliance is a priority, and that the Federal government should be held to the same standards as everyone else. EPA has supported the concepts reflected in H.R. 1056 and S. 1140 based on these principles, and EPA and other Federal agencies are making concerted efforts to achieve these objectives.

Enforcement is often necessary to return facilities to compliance; that is what these two bills are about and EPA continues to support vigorous enforcement of the law. Through the use of administrative orders, a facility commits to a schedule to return to compliance. The final order represents a commitment to the regulatory agency and the public; a commitment that the facility will in the future operate in compliance with environmental requirements and take the necessary steps to return to compliance.

EPA has always viewed penalties as a critical component of any enforcement program. EPA believes that penalties serve as a valuable deterrent to noncompliance, and help to focus facility managers' attention on the importance of compliance with environmental requirements.

S. 1140 raises an additional important issue. The scope of cleanup activities at Federal facilities is so vast that EPA has consistently stated that something must be done to ensure that whatever level of funding the Congress appropriates for Federal facilities cleanups is allocated to those sites in the first instance representing significant threats to environment and public health. It is this question of where and when cleanup activities will be undertaken at Federal facilities that is at the core of the sometimes uneasy relationship between the State and Federal government. If a rational process could be designed to set annual environmental funding priorities for Federal facilities cleanups, many of the concerns of both the State and Federal governments relating to where and when cleanup will begin would be resolved.

This will require the establishment of a national priorities setting process which provides for meaningful involvement of the states both in its development and in its implementation. The process should be designed so that all parties are committed to making it work in the public interest, and that the integrity of the process, once established, is preserved. EPA would not oppose legislation which embodied such a priorities concept, and would be pleased to work with the committee on such a proposal.

Over the last several months EPA has been working with others in the Administration on these issues. The Administration is now ready to work with you to modify S.1140 to address these concerns. EPA firmly believes that the success of the Federal government's efforts to clean up Federal facilities will depend upon our ability, as a nation, to create and implement a logical, publicly understood and supported, process for establishing cleanup priorities. The states must play a critical role in the design and implementation of this process, given their important responsibilities under environmental law. There seems to be widespread support establishing a priories process among the states. All the governors in states which have Department of Energy facilities within their borders have called for a national priority system, and the National Association of Attorneys General and the National Governors Association have recently issued a report which, among other recommendations, calls for establishing a "national agenda" for the cleanup of Federal facilities. EPA believes that a proposal which calls for the establishment of a priority-setting system for cleanup within a year, to be followed by a report to congress on a priories mechanism, together with any legislation for its implementation, would be an appropriate addition to S.1140.

In conclusion Mr. Chairman, I want to reiterate that the Administrator is committed to moving out aggressively on Federal facilities compliance and cleanup. As the President's statements make clear, the Administration is placing a high priority on Federal facilities cleanup and compliance. The Administrator is keenly aware that without a credible process for ensuring accountability, other efforts by the Administration to secure compliance and cleanup at Federal facilities will be viewed with skepticism, and real successes will be obscured. EPA wants to work with the Committee to address the comments discussed above, and to develop a comprehensive approach which ensures accountability and is consistent with the objectives of S.1140.

This concludes my prepared statement. I would be pleased to answer any questions you might have at this time.

Not for publication until released by the
Committee on Environment and Public Works
Unites States Senate

Statement of

David J. Berteau

Principal Deputy Assistant Secretary of Defense

(Production and Logistics)

Before the
United States Senate
Committee on Environment and Public Works

May 2, 1990

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to provide the Department of Defense's comments regarding S. 1140, a bill that would waive the sovereign immunity of Federal agencies to expand the imposition of fines and penalties.

The Department of Defense (DoD) strongly supports the intent of the bill, which is to apply effective environmental compliance incentives to Federal agencies.

The Department is 100% committed to compliance with all environmental laws and regulations. This means that DoD is pledged to satisfying the same requirements, meeting the same standards, and obtaining the same permits, and so on, as required of the private sector by Federal and state regulatory agencies. Mr. Cheney has himself endorsed this position to all components of the Department. In response, the Department is sponsoring the Defense and Environment Initiative to ensure sustainable compliance. Not only are we going to do a better job at quickly correcting violations when they occur, but we are also going to anticipate through the programming and budgeting process our future compliance obligations.

Pollution prevention plays a central role in this overall goal of sustainable compliance by simply avoiding generating the waste in the first place. In addition to this effort, beginning in FY 1992, the Department is tying our process, which identifies all our environmental requirements and needs, directly to the development and submission of our budget. This will move us further in the direction of identifying and meeting all our environmental obligations before they come due.

Our primary concern is ot over the imposition of fines and penalties, but rather the impact they would have on the Department's ability to clean up the worst sites first and on the funds budgeted to clean those sites and achieve compliance while performing our defense missions. We believe that the goals of cleanup and compliance can best be served by a program of fines and penalties that does not detract from these goals.

Fines and Penalties

Worst First Funding

The Department supports the Administration's position that fines and penalties for compliance under the Resource Conservation and Recovery Act (RCRA) are not objectionable and that, in fact, fines and penalties may serve as an effective tool for use in conjunction with other enforcement mechanisms in an effective compliance program. By RCRA compliance, we mean the day-to-day operations and management of hazardous waste as distinguished from cleanup projects or major facility modifications. For example, such functions as manifesting, training, labelling, and tracking of hazardous waste are clearly part of the day-to-day activities. The Department fully accepts its responsibility for compliance, but because there are important distinctions in the way day-to-day compliance versus cleanups and major facility modifications are funded under our budgetary system, we have some concerns that we feel are worth raising before the Committee today.

We share a fundamental interest with the Committee--protection of human health and the environment. Our most important objective is to identify the facilities that warrant attention. Then we must optimize cleanup and compliance by maximizing the incentives that accelerate cleanup and foster sustainable compliance.

For this objectives to be met to the maximum extent possible, we must insure that leanup is first directed where the public is most likely to be affected. We believe strongly that the Congress and Federal agencies, in consultation with the states, must be able to set the priorities for cleanup based on worst sites first. We strongly endorse the concept of a process where states would participate fully in the development of our annual cleanup priorities. This worst-first concept, however, should not be limited in application to RCRA/CERCLA (Comprehensive Environmental Response Compensation and Liability Act) projects only. It is relevant for all media cleanup and capital environmental improvement projects and we would encourage the Congress to consider this.

Let me digress for a moment about our funding process. Most of our capital improvement projects are funded after a lengthy review process through the Military Construction Authorization and Appropriations Acts. The length of the process is determined in large part by the Congressional budget process, federal procurement laws and regulations, as well as special defense requirements. For example, Congress has directed that all project designs be 35% complete before the budget submission to ensure that project cost estimates are reasonably accurate and that construction can start early in the fiscal year authorized. With all of the rules affecting design and construction of these projects, it is not unusual for it to take anywhere from three to five years from identifying a project need to having the funds and authority to proceed with the project. This is in addition to the time it takes for both procurement and construction.

Returning to the issue of prioritization, we are already working with the states through the Defense State Memoranda of Agreement (DSMOA) for implementation of the concept of worst-first funding for our cleanup program. We voluntarily developed this concept with the active involvement of the states to provide a number of benefits or services to states, that include among others:

--providing a single source of funding to use in reviewing technical documents and participating in the cleanup up process at DoD installations in their respective states,

--receiving a large percent of their allotted funds in the early, resource draining steps of cleanup oversight,

-- reimbursing states for past costs incurred after October 17, 1986.

In return, DoD receives the state's review and comments on our plans and studies and an acknowledgment of the need for the worst-first funding approach. To date, three states have signed agreements, another five are in the final stages of signature, and over 30 more have expressed strong interest. We believe this is a rational way to go. We are also working with the National Academy of Sciences and the states to enhance our Defense Priority Model.

Audits and Compliance Agreements

We fully support the multimedia concept that is included in the Senate bill. We believe that we must work harder to identify environmental solutions that benefit the whole environment--not just trade one problem for another. We intend to do this through multimedia environmental audits throughout the Department of Defense.

We agree with the Senate that audits are an invaluable tool to improve compliance. They help us identify specific problems as well as patterns that reflect more systemic problems. Audits function as a quality assurance check on the system to help us raise issues for management attention and are part of our overall total quality efforts. Audits themselves create incentives for compliance. They can be a factor in employees' performance reviews and motivate positive performance. They lead directly to results. We have already incorporated audits into our structure and we believe they are the foundation of any sustainable compliance effort. My office has also asked the DoD Inspector General (IG) to review the Services' and DoD Agencies' environmental audit programs for effectiveness in identifying problems and bringing about resolution. The IG will provide quality control, or if you will, check the checker. This, we give credibility to our audit program.

We need to be particularly careful that we make this audit program work. We want audits to lead to compliance and corrective action--not fines and penalties. Rather, we think we should create a system of internal audits that would identify our problems to the regulating community and the public and lead us to quickly enter into responsible agreements to correct problems. We expect to be held fully accountable if we do not correct the problems under the time frame covered by the agreement. In addition, this process of identifying and pursuing resolution through audits would not affect any violations identified through routine EPA or state inspections.

To protect against repeat violations and ensure an effective cleanup, we intend to enter into agreements with State and Federal regulatory agencies on the problems we identify through internal audits or by other means. These agreements would contain stipulated penalties--that is, there would be some specified fine for our failure to correct the problem in a certain time-frame. We are committed to meeting our obligations under any agreement we sign. We fully understand that this obligates us to request, in the budgetary process, sufficient funds to meet deadlines established by agreement.

Use of Funds Generated by Fines and Penalties

With respect to how the funds generated by fines and penalties would be used, the House version of S. 1140, H.R. 1056, contains a provision that would require these funds to be used for environmentally-related purposes. The Department strongly agrees with this. We think that funds paid out for environmentally-related reasons should be used to further environmental goals.

Bonds and Insurance Accounts

In recent months the Department has been confronted with state demands to post bonds or pay into state insurance programs to assure availability of funds for RCRA projects when time comes due. As far as the Department is concerned, the intent of these actions is to make the Federal government pay for a project now, ahead of the appropriation process. It is in direct conflict with the Anti-Deficiency Act and the governmental policy of self insurance. It also circumvents the Congress' explicit role to direct where Federal funds should be used, undermines our worst-first funding approach, and allows the state to draw interest on Federal dollars. It is absurd to make the Federal government promise to have money. We would all be in trouble if the government ran out of money.

Military Treatment Works

With respect to military treatment works that are used primarily to treat domestic sewage/non-industrial wastes, the Department supports the approach started in H.R. 1056 that would allow these DoD facilities to be treated like their private sector municipal counterparts. We believe strongly that this provision, with the cavaets necessary to protect public health and the environment, should be expanded to all military treatment works that primarily treat domestic waste. As it now stands, Federal treatment works are subject to conflicting regulations that do not affect local municipal treatment works. This situation runs counter to the principle of treating us "just like everyone else." Because of this peculiar distinction, the Navy is unable to operate to design capacity, a brand new $14 M treatment facility in North Carolina and may be required to perform a $35 M corrective action that would not be required of a public treatment works. There are at least 88 other DoD facilities that could fall into this same category.

Summary

In conclusion, if we can do all this, we can produce results. Through a system of 100% internal audits, we can identify the problems, get rapid agreement on the solutions, and begin quickly to execute those agreements. With prioritizations, we can ensure that we protect public health and the environment.

The Department would like to continue to work with you in the development of this bill. Thank you again for asking me to be here.

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TESTIMONY OF

SHIRA FLAX
TOXICS SPECIALIST
SIERRA CLUB

BEFORE THE
SENATE ENVIRONMENT & PUBLIC WORKS COMMITTEE

ON THE
FEDERAL FACILITIES COMPLIANCE ACT
S. 1140

MAY 2, 1990

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*
National Headquarters: 730 Polk Street, San Francisco, California 94109 (415) 776-2211

PRINTED ON RECYCLED PAPER

Sierra Club thanks the Environment & Public Works Committee for providing us with the opportunity to testify in support of S. 1140, the Federal Facilities Compliance Act. We do so on behalf of more than one-half million Sierra Club members. Many of our members live near Department of Energy (DOE) and Department of Defense (DOD) facilities.

The Federal Facilities Compliance Act, S. 1140, is Sierra Club's highest toxic priority for this Congress. Passage of S. 1140, as written, is one of the Club's top legislative objectives. S. 1140 also will be the only toxics bill voted on by the Senate this year.

Citizens Do Not trust the Department of Energy

S. 1140 is important, because, federal facilities are the most dangerous toxic polluter in their State. People living near federal facilities believe that the toxic waste generated there are not managed safely. They feel their health is at risk. To them, the very government that passes strong environmental laws is not the same government that guarantees that their health is being protected.

People living near Department of Energy facilities are convinced that their health, and the health of their children are being harmed.[1] They do not trust the Department of Energy. They do not trust DOE, because for years, the Department of Energy argued that it is accountable to no one but itself.

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[1] A United States District Court ruled that citizens living near a Department of Energy facility, the Feeds Material Production Center, were entitled to injunctive relief and punitive damages, from a past DOE contractor, because of mental distress and decrease of property values caused by the site's environmental practices. A similar lawsuit has been filed by Colorado citizens living near the Rocky Flats Plant, a DOE facility near Denver, CO. See Merilyn Cook, William Jr. and Deloris Schierfoldh et. at., plaintiffs vs. Rockwell International and Dow Chemical, defendants.)

DOE's History of Resistance to Environmental Regulation

When the Resources Conservation and Recovery Act (RCRA) was passed in 1976, the Department of Energy argued that its wastes were not subject to RCRA regulation. DOE did not comply -- at all -- with RCRA for 8 years. In 1984 a District Court ruled that DOE facilities are subject to RCRA.[2] The Department then issued an internal rule that exempted its radioactive mixed with hazardous waste from RCRA. DOE agreed to subject only its non-mixed hazardous waste streams to RCRA regulation. Non-mixed hazardous waste represent a small percentage of the DOE total waste stream. DOE exempted most of its waste from RCRA until 1987.[3]

The Department of Energy has repeatedly tried to exempt itself from environmental regulation. Self-exemption convinces citizens living near DOE sites that its waste management practices do not protect their health and the environment.

When state regulators acted to enforce RCRA to end DOE self-regulation of waste management, DOE resisted state enforcement action. In legal papers, DOE resisted state enforcement by stating that RCRA itself did not give states enforcement authority. It stated that RCRA's waiver of sovereign immunity is narrowly written, thus prohibiting routine enforcement of RCRA and State law.[4]

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[2] Legal Environmental Assistance Foundation (LEAF) vs. Hodel cited in Dan W. Reicher: "Statement" before Subcommittee on Transportation, Tourism and Hazardous Materials of Committee on Energy and Commerce, House of Representatives, March 3, 1987, p. 179.

[3] 1987 change in internal rule on special by product material cited in Joseph Salgado: "Statement of Under Secretary, Department of Energy" before Subcommittee on Transportation, Tourism and Hazardous Materials of Committee on Energy and Commerce, March 10, 1987, p. 388.

The Department, in turn, was embraced a position developed in a memo written by the Attorney General Edwin Meese III. The memo opposed that actions taken to enforce environmental laws at federal facilities because they would preempt the discretionary power of cabinet Secretaries. If EPA decided to litigate enforcement at a federal facility, or if a state prevailed and began a settlement agreement, the Department of Justice would not support EPA litigation and oppose state settlement agreement enforcement. In short, the Attorney General strongly discouraged enforcement of environmental laws at federal facilities by the EPA and the states.[5]

During a House Energy and Commerce subcommittee investigation of environmental compliance at federal facilities, the Department of Justice argued that, poor compliance notwithstanding, EPA and the states' regulatory authority is limited. The Department of Justice stated that limited regulatory authority was supported because the RCRA waiver of sovereign immunity is narrowly written. To the Department of Justice, RCRA did not allow states to have civil penalty authority. DOJ, furthermore, argued, that while federal facilities have to meet RCRA requirements, enforcement actions, such as orders, are not RCRA requirements. Because a state cannot issue an administrative order, it has no authority to impose a penalty if that order is violated.[6]

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[4] Department of Justice's arguments, made on behalf of the Department of Energy used to plead against a civil penalty issued for RCRA violations at Hanford, 1984 cited in Kenneth O. Eikenberry: "Statement" before Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, March 14, 1988, pp. 12-13.

[5] Edwin Meese III: "Memorandum to All Assistant Attorneys General on Department Policy Regarding Consent Degrees and Settlement Agreements," March 13, 1986. Quoted in Hearing Record of Oversight & Investigations Subcommittee of House Energy & Commerce, April 28, 1987.)

While the federal government now does not oppose state order authority, if that order's compliance schedule is violated, a state still cannot issue a civil penalty.[7] The federal government continues to argue that RCRA does not allow states to fine a federal facility if it violates a RCRA requirement, such as an agreed upon compliance schedule.

Civil Penalities Mean Strong Enforcement

S. 1140 clarifies that states have RCRA civil penalty authority at federal facilities. Civil penalty authority is a non-judicial enforcement action taken by a state environmental agency.

Civil penalties have long been viewed as key to law-enforcement. According to the Environmental Protection Agency, "(p)enalties act as substantial deterrent to non-compliance and speed the (generator's) efforts to comply."[8] Civil penalties motivate generators of waste to comply with RCRA.

Without deterrence, there is no punishment for violating a law. Without the threat of punishment, there is little to motivate compliance with the law.

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[6] Donald A. Carr: "Statement of Acting Attorney General, Land and Natural Resources Division, Department of Justice" before Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, April 12, 1989, p. 111.

[7] Roger J. Marzulla: "Statement of Acting Attorney General, Land and Natural Resources Division, Department of Justice." before the Subcommittee on Transportation, Tourism and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives, March 10, 1988, p. 435.

[8] United States Environmental Protection Agency, "Memo" on enforcement of the Clean Water Act against municipalities cited in Anthony Celebrezze, Jr. "Statement of Attorney General, State of Ohio" before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, April 28, 1987, p. 12.

Weak Enforcement Leads to Public Distrust

If civil penalties cannot be used to punish violations of RCRA at federal facilities, citizens believe there is little left to motivate a federal facility to comply with the law. Unless a state decides to pursue costly legal action to enforce a RCRA requirement, citizens know there is little a state can do to encourage compliance with the law.

People living near Department of Energy sites believe the Department does not want to end self-regulation. DOE is more interested in keeping the Environmental Protection Agency and the states from having regulatory authority than demonstrating -- through RCRA compliance -- that wastes hazardous to people's health are managed safely.

S. 1140 Restores Public Trust

The Federal Facilities Compliance Act, S. 1140, ensures that hazardous waste will be managed according to RCRA regulation, not internal agency order. It affirms that RCRA's present statutory language contains a waiver of sovereign immunity. S. 1140 confirms that civil penalty authority, used to enforce RCRA against business and municipal governments, is to be applied against federal facilities.

SIX WEEKS OF NON-COMPLIANCE AT ROCKY FLATS

One of the best arguments for passage of S. 1140 appears in the events of the last 6 weeks at one DOE facility in Colorado. Within the past 6 weeks the Department of Energy at Rocky Flats has been told 3 times it has violated RCRA.

In late March, the Colorado Department of Health issued a Notice of Violation (NOV) against Rocky Flats. A few days later, the State and EPA Region VIII temporarily suspended Interim Remedial Action (IRA) at Rocky Flats. Two weeks later, the United States District Court overturned DOE's determination that an important waste stream at Rocky Flats was not subject to RCRA regulation.

Interim Remedial Action Suspended

In late March, the Colorado Department of Health and EPA Region VIII seriously considered ordering suspension of Interim Remedial Activity (IRA) at 881 Hillside, a RCRA corrective action site. The IRA was being done to keep toxic groundwater contamination from moving offsite into drinking water supplies. 881 Hillside was once ranked by DOE as the single site within its entire production complex posing the greatest potential risk to human health.

The State of Colorado and the EPA region did not issue a suspension order, because DOE itself temporarily suspended activity and agreed to resolve the regulators' concerns.[9]

Regulators began to move towards suspending Interim Remedial Action, because of what was seen during the first inspection of the site. State and EPA inspectors found that data from monitoring equipment could not demonstrate compliance with a workplan approved by the regulators. The State and EPA, therefore, could not verify that the corrective action activity was following an approved workplan.

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[9] Department of Energy, Rocky Flats Office: "Letter to Colorado Department of Health and Environmental Protection Agency Region VIII," mARCH 27, 1990.)

Notice of Violation of RCRA Issued

A day after the IRA was temporarily suspended, the Colorado Department of Health issued a Notice of Violation (NOV) against DOE. The NOV was issued because DOE had submitted an inadequate RCRA groundwater monitoring assessment plan[10] which is the first step towards measuring the extent of groundwater contamination. The plan was rejected because it did not meet regulatory and scientific standards.

It lacked specific detail, namely reference to Colorado State groundwater requirements. Although massive amounts of data was available to support conclusions, the plan insufficiently explained how the data would be evaluated to ensure that is accurately assessed groundwater contamination. Rocky Flats did not meet the Quality Assurance/Quality Control (QA/QC) standards of its state regulator.

Deficiencies cited in the recent NOV are being successfully resolved.[11] But the reasons why the Colorado Department of Health rejected this plan are the same reasons it has rejected all past plans. The State has been requiring a RCRA groundwater monitoring assessment plan from Rocky Flats since 1986[12]. Through the years, though each plan showed incremental improvements, all plans were rejected for the same reason: failure to meet Colorado State groundwater requirements.[13]. Since 1987, the State of Colorado and EPA Region VIII have rejected Rocky Flats' scientific work, because it failed to meet their QA/QC standards.[14]

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[10] Colorado Department of Health: Notice of Violation for Groundwater Assessment Plan for Rocky Flats, March 28, 1990.)

[11] Colorado Department of Health," Letter to United State Department of Energy, Rocky Flats Office and ER&G Rocky Flats Inc," April 17, 1990.)

[12] United State Department of Energy, United States Environmental Protection Agency, Colorado Department of Health: Federal Facility Compliance Agreement, July 1986.)

The NOV illustrates that continuing non-compliance occurs at Rocky Flats partly because the state lacks civil penalty authority. If the State of Colorado could penalize continuing non-compliance, Rocky Flats would have been further along in its compliance with the RCRA groundwater monitoring requirement.

Court Clarifies DOE Wastes Subject to RCRA

Two weeks after the IRA was suspended, DOE and a former Rocky Flats contractor received a Federal District Court Order that required them to treat a waste stream DOE had consistently argued was not RCRA waste, as RCRA waste.[15] DOE's position that the waste was not subject to RCRA regulation, furthermore, was in clear defiance of EPA Region VIII. In 1988, EPA Region VIII determined that the waste in question was RCRA waste.[16] If the Sierra Club had not sued, that EPA regional determination would not have been enforced. If Sierra Club had not filed a citizens suit, this hazardous waste stream would have remained poorly regulated, because EPA is unable to issue an Administrative Order against a federal facility.

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[13] Colorado Department of Health, United States Environmental Protection Agency: Ground-Water Monitoring Evaluation US Department of Energy Rocky Flats Plant Golden, Colorado, July 1988.)

[14] Colorado Department of Health and Environmental Protection Agency Region VIII: "Comments on 881 Hillside Remedial Investigation, October 1987.)

[15] Sierra Club Plaintiff, v. United States Department of Energy, and Rockwell International Corporation, Defendants. Judge Lewis T. Babcock: Memorandum and Opinion, April 12, 1990.)

[16] Cited in Memorandum and Opinion, p. 11.)

The District Court Judge, furthermore, ruled that a compliance agreement, developed to identify and manage the waste, was not sufficiently protective of human health and the environment. His order described the compliance agreement as containing inordinately flexible deadlines, including "no deadline for compliance."[17]

For four years, the Department of Energy repeatedly failed to submit a groundwater monitoring plan that references state law. A corrective action activity began with the regulators doubting that an authorized workplan was being followed. Fourteen years after passage of RCRA, DOE maintained that a hazardous waste stream is not subject to RCRA regulation. A compliance agreement negotiated with DOE was found, by a Federal District Judge, to be wholly inadequate.

This type of poor environmental performance continues at Rocky Flats even though the Department of Energy Secretary strongly insists upon full compliance with environmental laws. Poor environmental performance continues even when both the Department and the contractor management at Rocky Flats demand vigorous adherence to high standards. Poor environmental performance continues even though Rocky Flats' workers want their site to be safe and cleaned up.

Sierra Club believes that S. 1140 creates a regulatory system that will help produce full compliance with environmental laws, and will result in a level of environmental performance that shows vigorous adherence to high standards. And it will guarantee to the workers at Rocky Flats that their facility will be managed safely and contamination cleaned up.

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[17] Memorandum and Opinion, pp. 9-10.)

In the absence of both a clear state civil penalty authority and a discretionary EPA Administrative Order authority, we believe that the assumption inadvertently present in continuing non-compliance at Rocky Flats will prevail. Environmental regulators are not viewed as authoritative. Until S. 1140 is passed, federal facilities will continue to perceive the states and EPA as outside agencies whose only role is to monitor, not enforce, their compliance with environmental laws. S. 1140 views EPA and the states as independence regulators whose role is to definitively enforce the law.

COMPLIANCE AGREEMENTS WILL NOT WORK UNTIL S. 1140 IS PASSED

Whether state and EPA regulators are perceived as authoritative appear in the current implementation of compliance agreements. Federal facilities are being brought into compliance with RCRA through agreements negotiated between them, EPA and the States. The essence of these agreements is schedules and milestones. Schedules and milestones are deadlines by which a RCRA requirement will be met.

The Hanford Tri-Party Agreement

The importance of deadlines is illustrated by one milestone in a compliance agreement signed at a DOE facility in Washington State.

Citizens living in Washington State and Oregon want the natural resources of the Columbia River to be protected. The Columbia River is a major recreational and economic resource for people living near the Oregon-

Washington border. The Hanford Tri-Party Agreement, a SARA Interagency Agreement and RCRA consent order, is designed to protect the Columbia River.

Low-level radioactive/hazardous waste now can be discharged an aquifer that feeds into the Columbia River from Hanford. In 1991 this contamination is scheduled to end.

According to a compliance schedule agreed upon by the Department of Energy and the Washington Department of Ecology, Washington State's environmental agency, in 1991 a by-pass system will be installed for B-pond, the current disposal facility at Hanford.[18] Once the B-pond waste is re-routed to a RCRA permitted unit, low-level radioactive/hazardous waste will begin to stop being discharged to the Columbia River.

B-pond is a unlined dirt pit. B-pond is not a double lined solid waste management unit with leachatte collection system and groundwater monitoring systems. B-pond provides no barrier to underlying aquifers. Whenever low-level radioactive hazardous waste is disposed to B-pond, that waste is dumped directly into the environment -- eventually migrating into the Columbia River.

Discharge to B-pond is open dumping. Open dumping is a practice outlawed in 1976 by RCRA. It is practice, therefore, that has been illegal for 16 years. Open dumping will continue at Hanford until 1991 when B-pond wastes are re-routed to a RCRA permitted unit.

The need to re-route B-pond wastes is not academic. In May 1989, equipment failed at Purex, a production unit at Hanford. Because of the equipment failure, approximately 60 pounds of uranium in about 3 million gallons of liquid waste were discharged into B-pond over a period of 9 days.[19] The equipment failure caused a spill of millions of gallons of liquid uranium waste, and caused an accident that could not be stopped for 9 days.

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[18] Washington State Department of Ecology, United States Environmental Protection Agency and United States Department of Energy: Hanford Federal Facility Agreement and Consent Order, 1989, p. D-13.)

Because B-pond was its disposal site, 60 pounds of uranium, in 3 million gallons of liquid waste, was dumped directly into the environment. If another similar accident occurs at Hanford, several million gallons of low-level radioactive/hazardous waste may well be dumped into the environment again.

The 1991 deadline for installing a by-pass system for B-pond is a commitment the Department of Energy has made to the Department of Ecology and to the citizens of Washington State and Oregon. It is a pledge to the citiziens of Washington State and Oregon to stop discharging low-level radioactive/hazardous waste into the Columbia River.

Unless S 1140 is passed, we believe DOE's pledge to end open dumping by 1991 may be broken, just as so many promised have been broken in the past.

Until S. 1140 is passed, environmental regulators will not be seen as authoritative. Citizens will believe that commitments and pledges -- deadlines placed in compliance agreements -- will not be honored.

The interplay between definitive regulation and public skepticism is illustrated by the saga of one milestone: fifty groundwater monitoring wells each year for Hanford.

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[19] Department of Energy, Richland Operations Office, "Letter to Environmental Protection Agency Region X Re: Hanford Environmental Incident, December 1, 1989.)

According to the Hanford Agreement, 50 groundwater monitoring wells are to be installed each year beginning in 1991, until the groundwater monitoring requirement of RCRA is met.[20]

We doubt whether the Department of Energy, at Hanford, will honor its commitment to fully comply with the RCRA groundwater monitoring requirement.

In testimony before the DOE Facilities Panel of the House Armed Services Committee, the Department of Energy was asked to comment on whether it had requested enough money to meet milestones in the Hanford Agreement. A Department spokesman answered by stating:

> " I question whether the groundwater monitoring wells have to be built in the numbers directed by the Hanford Agreement....There are questions concerning whether (DOE) should be drilling as many holes up there as people recognize."[21]

In ways that this spokesperson could not have imagined, that statement tells citizens that the Department of Energy does not view its environmental regulators as authoritative. The failure to perceive regulators as having definitive authority causes citizens to doubt that deadlines will be honored.

The annual installation of 50 groundwater monitoring wells is a milestone placed into the Hanford Agreement. Language in the Agreement provides for milestone and schedule changes under certain conditions.[22]

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[20] Washington State et. al.: Hanford Federal Facility Agreement and Consent Order, "Action Plan Work Schedule," p. D-39.)

[21] Transcript,"Testimony before the DOE Facilities Panel, Readiness Subcommittee, House Armed Services Committee," March 28, 1990.

[22] Washington State et. al.: Hanford Federal Facility Agreement and Consent Order, "Article XVI: Schedules.; Article XL: Extensions.)

Language of the Agreement not only defines those conditions, but also defines the Department of Energy as the regulated community and the Department of Ecology as its regulator.

The Hanford Agreement does not allow a milestone to be changed, because the Department of Energy has concluded that a RCRA groundwater requirement reflects poor management planning. The Hanford Agreement does not allow the Department of Energy to change a schedule, because its management believes that a costly schedule should be delayed.

The Department of Energy's comments on the Agreement's groundwater monitoring requirement show that it still does not view the Department of Ecology as a definitive regulator. S. 1140 will ensure that the Department of Ecology is defined as the definitive regulator, and the Department of Energy is clearly defined as the regulatee. S. 1140 also will facilitate full compliance with all RCRA requirements at Hanford.

Priority Systems May Undermine Civil Penalty Authority and Delay Corrective Action

Some argue that RCRA corrective action requirements at all federal facilities should be prioritized. The concept is that funding for federal facility corrective action should be provided first for contamination from sites posing the greatest risks to human health. Subsequently, cleanup of contamination at sites of lesser risk could be funded.

Sierra Club opposes efforts to add a prioritization system to S. 1140. We believe the creation of a prioritization system, if not carefully crafted, could undermine the very civil penalty authority that S. 1140 clarifies. A Congressionally authorized priority system could be used, contrary to this

Committee's intention, as a defense to Administrative Orders and civil penalty authority.

Given the incredibly slow pace at which the corrective action is being implemented, it is by no means clear that the full scope and nature of corrective action needs at federal facilities will be known for many years. Since few states currently have corrective action authority, we see no need to rush to address a prioritization system. We see no evidence that a rash of corrective action requirements will soon be unleashed by various states that could overwhelm the budgets of federal agencies.

The biggest problem regarding addressing contamination problems at federal facilities is the long history of inaction. Language affirming Congressional support for a prioritization system could allow the Department of Justice to challenge a state civil penalty on the basis that Congress, through the appropriations process, has essentially exempted low-priority sites from corrective action. Indeed, a prioritization system could create a "wait-in-line" syndrome where cleanup progress at one site is blocked simply because progress at higher priority sites has not been made due to technical or other delays. We urge the Committee to send a simple and strong message to federal agencies that the history of non-compliance with RCRA must be ended. The addition of a priority system to S. 1140 will only serve to muddy that message.

Once a better understanding of the nature and extent of corrective action needs at federal facilities has been gained, the Committee may want to examine the need for a priority system. We would be happy to work with the Committee at that time.

Criminal Violations of RCRA

Sierra Club believes that the language contained in S. 1140 clarifying criminal penalties for federal agency employees is much needed. The language provides federal employees with the motivation to "Just Say No" when they are asked to violate RCRA by their superiors. Congress needs to send a strong message to federal employees that following orders is not a sufficient basis for threatening public health and the environment.

Conclusion

In reality the passage of S. 1140 is a very modest step to help ensure that federal facilities take the same measures to protect public health and the environment as are required of privately owned facilities. In our view, it is the least Congress can do in response to the years of intransigence by agencies of our government.

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April 30, 1990

The Honorable Quentin N. Burdick
Environment & Public Works Committee
United States Senate
Washington, DC 20510

Dear Senator Burdick:

On Wednesday, May 2nd, the Senate Environment & Public Works Committee will hold the legislative hearing on S. 1140. We urge you to oppose all weakening amendments, and to markup S. 1140 as written.

S. 1140 provides the enforcement tools necessary for full compliance with the Resource Conservation & Recovery Act (RCRA) by federal facilities. Federal facilities show a higher rate of noncompliance with RCRA than the private sector. A higher rate of RCRA noncompliance by federal facilities, we believe, is partly attributable to the need for Congress to clarify that RCRA can be enforced against the federal government. Absent Congress' clear statement that a waiver of sovereign immunity exists, federal facilities argue that States cannot levy civil penalties when they violate RCRA. They also claim that EPA cannot issue Administrative Orders. A basic tenet of law enforcement -- the use of punishment to deter violations -- is absent.

Unless states and EPA can use strong enforcement tools to deter RCRA violations at federal facilities, there is no guarantee that unsafe management of hazardous waste will end. There is no guarantee, furthermore, that today's RCRA violations will not become tomorrow's Superfund cleanup problem.

S. 1140 clarifies Congress' intention, stated in 1976, that RCRA is to be enforced equitably, in the same manner at federal facilities as it now is enforced against private industry and municipal governments. Congress did not intend that our nation's worst polluters, federal facilities, be exempt from fines if they violate RCRA, while business and municipal governments are not. S. 1140 ends that double standard.

We urge you to support S. 1140, and to oppose all weakening amendments.

Sincerely,

A. Blakeman Early
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Sierra Club

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"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*
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April 30, 1990
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ENVIRONMENTAL DEFENSE FUND

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May 2, 1990

TESTIMONY OF THE ENVIRONMENTAL DEFENSE FUND BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS REGARDING S. 1140 THE FEDERAL FACILITIES COMPLIANCE ACT

Submitted by Melinda Kassen, Senior Attorney
Environmental Defense Fund Rocky Mountain Office

Good morning Mr. Chairman and members of the Committee. I am Melinda Kassen, a Senior Attorney in the Rocky Mountain Office of the Environmental Defense Fund (EDF) and Chair of EDF's Radiation Program. Before joining EDF, I served as an Assistant Attorney General for the State of Colorado in the Natural Resources Section and as a Deputy City Attorney for the City of Los Angeles in the criminal trials branch. I received my undergraduate degree from Dartmouth College and my law degree from Stanford University. Presently, I also sit on the Rocky Flats Environmental Monitoring Council, the Governor's Advisory Committee on Nuclear Materials Transportation and the Department of Energy's External Review Group for Prioritization of Environmental Restoration Actions.

EDF is a national, not-for-profit organization with seven offices and 150,000 members across the country. Composed of scientists, attorneys, economists, educators and other concerned citizens, EDF advocates in legislative, judicial and administrative fora, environmentally and economically viable solutions to the nation's and world's ecologic problems. EDF has long maintained a toxics program with the goal of eliminating or substantially reducing the stress on our environmental resources that derives from hazardous -- including radioactive -- emissions and discharges. In the Rocky Mountain Office, located in Boulder, Colorado, EDF has focused a substantial amount of energy on the problems associated with the extensive contamination that has occurred at two federally owned facilities, the Rocky Mountain Arsenal and the Rocky Flats Nuclear Weapons Plant.

Essentially, I would ask the Committee to accept my testimony as a field report. The actions described herein amply demonstrate the need for S. 1140. To maintain citizens' faith in the federal government, it is imperative that federal facilities comply with and be subject to enforcement under public health, safety and environmental laws in the same manner as are state and private facilities.

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The pollution that has occurred as a result of the lack of environmental sensitivity at federal facilities includes many of the worst sites in the country. Taking all federal facilities as a group, they represent the largest source of environmental contamination in the land. It is unconscionable that the party responsible for having created and maintained this source should continue to be exempted from the very laws designed to minimize additional contamination and reclaim the existing polluted areas. Because meaningful enforcement is the key to effective compliance, S. 1140 would at last provide the mechanism to put the federal government into compliance with national law. Such a step is, we believe, critical to the process of renewing citizen confidence in federal activities.

RCRA's "cradle to grave" system for the management of hazardous wastes includes a comprehensive enforcement scheme. The Environmental Protection Agency (EPA) and states authorized by EPA to administer RCRA can issue administrative orders, which may include the assessment of penalties both for violations of statutory and regulatory provisions and for violations of the agency's orders. Also, the agencies can file actions in federal district and state trial courts seeking injunctions, civil penalties and criminal sanctions, also including penalties. Moreover, in section 6001 of RCRA, Congress expressly stated that federal agencies:

> are subject to and must comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner and to the same extent as any person is subject to such requirements ....

Thus, one might ask as a preliminary matter, in light of this seemingly explicit Congressional directive to federal agencies to comply with RCRA and to submit to enforcement by the appropriate regulatory agency, "why is S.1140 necessary?" Unfortunately, the Department of Justice has adopted a policy that bars EPA outright from suing a federal agency for a RCRA violation or from issuing an administrative order for such violation and that strenuously resists state and citizen group attempts to have courts impose civil penalties. Thus, notwithstanding EPA's observation that judicial enforcement is an important tool for inducing compliance because of its "deterrence value," (see, EPA, "Your Guide to the United States Environmental Protection Agency," OPA 87-005 (1987)), and notwithstanding the fact that the American Law Division of the Congressional Research Service has disagreed with the legal basis the Department of Justice offerred for its policy, there are neither federal enforcement actions nor unilateral EPA compliance orders against federal government polluters. It is for this reason that Congress should pass and that EDF supports S. 1140.

Effective Enforcement Would Accelerate Federal Facilities' Compliance in Reporting Ongoing Hazardous Waste Generating and Storage Activities.

Even an abbreviated chronology of the Department of Energy's (DOE) attempts to submit a legally adequate permit application for the Rocky Flats Plant under the Resource Conservation and Recovery Act (RCRA), including a demonstration of ground water monitoring capabilities, exemplifies DOE's repeated failure to inform the regulatory agencies about the scope of its activities at the Plant. It is because of this type of recalcitrance that DOE and its sister agencies must be subject to meaningful enforcement under the nation's toxic waste laws.

The Rocky Flats Plant was built in 1951 and began operating in 1952. Located 16 miles northwest of downtown Denver, the Plant is upwind and upstream of a 1.5 million person metropolitan area. Rocky Flats' primary mission is to manufacture parts, including the plutonium pits, or triggers, for nuclear weapons. In addition, scrap plutonium from such manufacture and plutonium from retired warheads is reprocessed at Rocky Flats. The machining and reprocessing of plutonium are accomplished with a multitude of chemical processes. Consequently, the emissions and discharges from the Plant include radionuclides, heavy metals and volatile organics. The more than 160 separate waste management units at the site have been grouped into ten operable units, of which one consists of a ground water contamination plume in which DOE has measured volatile organics at levels tens of thousands times drinking water standards, another entirely of off-site radioactive contamination, and a third of the soil and ground water pollution from 11 curies of plutonium that leaked from barrels filled with contaminated cutting oil when they were stored in a field at the back of the complex. Because of Rocky Flats' close proximity to a major metropolitan area, because Plant discharges occur in the water sheds of two terminal storage municipal water supply reservoirs, and because of gross mismanagement and past inattention to the environmental impacts of operations, the Department of Energy itself has determined that the first above-described site poses the greatest threat to public health, safety and the environment of all sites within its 17 facility weapons complex.

On November 19, 1980, DOE submitted a RCRA permit application in which DOE reported that Rocky Flats generated 3900 tons of mixed radioactive-hazardous waste annually, but that such waste was not subject to regulation under RCRA because of its radioactive nature. In July 1981, DOE asked EPA to consider Rocky Flats a "small quantity generator" of hazardous waste under RCRA 1/ due to the limited amounts of nonradioactive hazardous waste generated at the Plant.

1/ RCRA defines a small quantity generator as one who generates no more than 2200 pounds of waste per month and one who stores no more than 2200 pounds of waste for any 90 day period.

On June 7, 1983, EPA and Colorado Department of Health (State) inspectors discovered that Rocky Flats had generated 21,500 pounds of hazardous waste in 1982, of which over 2200 pounds was stored at the Plant. One month later, DOE withdrew its permit application because it had asserted "in error" that the Plant was a small quantity generator.

On August 22, 1983, DOE resubmitted an application in which it stated that the Plant generated 13,000 pounds of hazardous waste annually of which 5200 was shipped off-site.

On May 30, 1985, DOE submitted another revised application stating that Rocky Flats generated 1.3 million pounds of mixed radioactive-hazardous waste annually, all of which DOE treated at the site and sent elsewhere. Less than six months later, on November 8, 1985, DOE's next revised application revealed that Rocky Flats generated 31.5 million pounds of mixed waste annually, 24 times the amount reported earlier that year and four times the amount admitted in the first 1980 application. In this late 1985 submission, DOE also asserted that the Plant was in compliance with RCRA ground water monitoring requirements.

When the State responded by issuing a notice of intent to deny DOE a RCRA permit, it sparked negotiations between the State, EPA and DOE. ultimately, they signed a compliance agreement on July 30, 1986 that established a schedule pursuant to which DOE was to submit sufficient RCRA applications.

DOE submitted revised RCRA permits applications to EPA and the State on November 28, 1986 as to which the State issued a notice of deficiency because DOE had failed, inter alia, to identify all waste units, waste streams and estimated annual waste volumes at the Plant.

In December 1987, DOE again submitted revised permit applications. Without yet having issued a permit, in May 1988, the State issued a Compliance Order alleging violations of both state law and the July 1986 tri-party compliance agreement. And, two months later, the State informed DOE by letter than the Plant was still in violation of the ground water monitoring systems requirements. DOE responded in part in August 1988 by submitted yet another revised permit application.

Throughout this entire period, DOE's internal correspondence reveals that the agency was dealing with the regulatory agencies with something other than good faith. For example, an internal July 1986 DOE memorandum described the Plant as "in poor condition generally in terms of environmental compliance" and conceded that DOE's RCRA permit applications were "grossly deficient" and that some of its waste facilities were "patently illegal." With regard to ground water monitoring, the memorandum revealed that the Plant "ha[d] basically no RCRA groundwater monitoring wells, ... serious contamination, and ... extremely limited environmental and waste characterization data for a site of this complexity." However, its authors advocated that DOE continue to withhold from the public information about "just how really bad the site is." And, in a late 1987 memorandum to the Acting Assistant Secretary for Defense Programs from DOE's manager of the Albuquerque Operations office that (at the time) oversaw Rocky Flats operations, the manager recommended that DOE "send[] a message to EPA that DOE and its management contractors are willing to 'go to the mat'" to oppose EPA enforcement actions of hazardous waste laws at facilities in the weapons complex.

Then, one early June 1989 morning, over 70 agents of the Federal Bureau of Investigation entered the Rocky Flats Plant on a warrant to search for evidence of criminal activity. And all of a sudden the picture changed. Not that the Plant is in compliance with RCRA -- far from it. However, DOE is now making more effort to comply and is negotiating compliance and interagency agreements in apparent good faith, rather than simply stonewalling.

In August 1989, the State was finally able to obtain enough information to issue a complete RCRA Part A permit. 2/ With regard to the RCRA Part B permit, although the State issued a Notice of Intent to Deny a portion thereof in November 1989, it has issued one part and is now reviewing comments on the remainder. The Plant's ground water monitoring system deficiencies are the subject of a compliance order from the State, while DOE's storage of other wastes in apparent nonconformance with the Land Disposal Requirements of RCRA is the subject of yet an EPA compliance agreement.

Notwithstanding the more rapid progress that has occurred since the FBI raid, a decade after DOE submitted its first permit application, Rocky Flats remains largely unpermitted. Moreover, the pattern revealed above is of the most reluctant of applicants, one who repeatedly misinformed both state and federal regulatory agencies about the size of waste generating activities at the Plant. It took five years of repeated effort from the regulating agencies to obtain a relatively accurate estimate simply of the amount of waste generated at the Plant annually. The regulatory agencies still contend that they have inadequate information about the precise characteristics of the thousands of waste streams identified at the Plant.

This type of behavior would simply not be tolerated by any other entity. Clearly, the enforcement actions available to the state and EPA were not enough to convince DOE even to submit accurate information in its permit applications. The absence of the potential for imposition of civil and criminal penalties is the one factor that distinguishes federal facilities from all other hazardous waste generators. The results of this difference

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2/ Ironically the most publicized part of that permit, that the Plant store no more than 1601 cubic yards of mixed waste is in doubt as a result of a district court ruling handed down April 12, 1990 in which the court held that hundreds of cubic yards of material DOE had classified as plutonium residues were in fact mixed wastes subject to RCRA regulation.

have been widespread federal disregard for both the process and the substance of RCRA compliance. S. 1140 is desperately needed to restore some balance in a system that is wildly tilted against any incentive to comply. If self-regulation on environmental matters had worked in this country, we would not have needed the Clean Air or Clean Water Acts. But it did not work. And these laws, with their citizen enforcement provisions, their civil and criminal penalty sections and their waivers of sovereign immunity have proved effective. It is time to extend the same strength to the nation's hazardous waste law.

Effective Enforcement Would Speed Completion of Clean up Activities and Corrective Actions at Federal Facilities.

Enforcing compliance with those requirements of RCRA directed at ongoing operations should help ensure that we not repeat the mistakes of the past that caused the federal government to become the largest polluter in the nation. However, conducting future operations in an environmentally sensitive manner, *i.e.*, according to the minimum requirements imposed by the federal hazardous law and enforced by the federal and state regulatory agencies and by citizen groups, will do little for the myriad of communities whose ground water and soils are threatened by the contamination that already exists from decades of neglect. By its opposition to S. 1140, the federal government is seeking in this regard as well to extend its ongoing exemption from meaningful enforcement against noncompliance with clean up requirements.

There is no compelling reason to exempt federal facilities from enforcement of any sections of RCRA and certainly not from the corrective action provisions. Clean up of past contamination pursuant to an enforceable permit, the standards set by law and regulation, and the schedules established under the ground rules laid out in the permit and the law should be an orderly site-by-site process. No entity that has contaminated ground water and soils in excess of legally established standards through activities should escape enforcement. Absent the most meaningful tools of enforcement, namely penalties, both civil and criminal, a polluter has substantially less incentive to comply, and certainly less incentive to comply in a prompt and efficient manner.

What is happening at the Rocky Mountain Arsenal, the most polluted square mile in the country, is an example of how a federal agency may currently avoid state-enforced RCRA regulation to the disadvantage of the state, the federal taxpayer and the surrounding community. Congress should act now to derail this contemptible course of action, all the more unseemly because it is being pursued by a federal agency.

Established in 1942 on a 27 square mile site ten miles to the northeast of Denver, the Rocky Mountain Arsenal was the place where the Army manufactured chemical and incendiary munitions in the 1940's, produced nerve gas in the 50's, and conducted munitions filling operations in the 60's. From

1970 until recently, the Army's sole mission at the Arsenal has been the disposal of chemical warfare materials, often through incineration of products from mustard gas to explosive components. Now, the Army's Arsenal mission is clean up. Starting in the late 1940's and continuing through 1982, the Army also leased a part of the site to private companies, most recently the Shell Oil Company, for their manufacture of herbicides and pesticides. At least 750 different chemicals were used at the Arsenal; there are now 178 hazardous waste sites at the property, including the infamous Basin F, a single holding pond containing a veritable cauldron of chemicals for which EPA expects the clean up action to cost in excess of 70 million dollars.

Litigation over clean up responsibility at the Arsenal began in late 1983, when both EPA and the State filed law suits under the Comprehensive Environmental Response, Compensation and Liability Act. The State has repeatedly sought to assert its authority under RCRA as the most effective means of ensuring a meaningful site clean up. For example, the State has issued the Army a compliance order for failing to carry out the clean up of Basin F in a manner consistent with RCRA requirements. The State's order does not address minor noncompliance; rather, the Order seeks to force the Army to correct leaks in containment liners, to regulate three presently unregulated tanks holding over 4000 gallons of hazardous liquids and to control the management of over 16 acres of toxic sludges removed from Basin F during the interim remedial action. With the final compliance order issued in September 1989, the State also sought civil penalties. The Army has responded to that order by asserting both that the issuance of the order is unlawful and that the Army is immune from state-imposed penalties even if the court finds that the Army has violated the state's hazardous waste law. Even now, the State's attorneys still assert that they have been unable to obtain basic information from the Army which in turn impedes the State's efforts to ensure that its citizens are protected.

Equal Treatment under the Law Would Alleviate Citizen Sentiment that the Federal Government Acts in a Lawless and Environmentally Insensitive Manner.

For the past 30 months, I have sat on the Rocky Flats Environmental Monitoring Council, a citizen body appointed jointly by Governor Roy Romer and Congressman David Skaggs to provide a forum for the presentation of information to the public about the nature of the Plant's clean up activities and ongoing operations that affect the environment. Between 40 and 300 people attend our monthly meetings. Although I do not testify here today on behalf of the Council, as a member thereof I offer the following observations regarding the Denver area community's sense of the Department of Energy's attitude about compliance with public health, safety and environmental laws. In a word, the citizens who speak at our meetings are outraged. They are angry at DOE; they believe that DOE has continually lied to them about the nature and extent of contamination at the Plant.

The citizens express distrust as well of EPA. Even though the manager of EPA's Rocky Flats efforts is well respected within the vocal community, EPA is accused of complicity, of failing to enforce compliance with federal law and of allocating inadequate personnel to monitor the situation at the Plant.

They are also angry at the State. They complain bitterly about the State's failure to enforce public health, safety and environmental standards at the Plant. The State is repeatedly accused of being ineffective and of acting in a manner akin to cowardice. These citizens believe that the State is weak and incapable of protecting their health, safety and environment from a federal agency bent on noncompliance with basic national laws.

The citizens are even hostile towards the council at times, contending that the community does not need more studies and more information, but rather that the community needs action. Because the council has no authority to force DOE and its contractor to comply with the law, the council is deemed by some to be per se unhelpful. Similarly, the 40 citizens appeared on April 24, 1990 to testify for five minutes each between 8 and 11:30 p.m. to the Advisory Committee on Nuclear Safety (the Ahearne Committee established by the Secretary of Energy to report on safety and operational issues within the weapons complex) repeatedly accused that Committee of doing nothing to help force DOE to abide by the law and to clean up the Rocky Flats Plant.

S. 1140, while not a complete solution to the frustration and rage expressed by these Denver area residents, would be an important step in remedying the situation. By making federal facilities subject to the same enforcement mechanisms as private and local government facilities, S. 1140 breathes new life into the Congressional policy statement that all waste generators will be treated "in the same manner" and that RCRA will be enforced against all violators "to the same extent." If DOE were subject to penalties for its illegal actions, if individual employees were subject to criminal prosecution for willful noncompliance with hazardous waste laws, and if both the State and EPA had the authority to take such action, citizens might begin to see the regulatory agencies act in a manner that shows they are willing and able to challenge DOE's cavalier noncompliance with the laws of the land.

The criticism of S. 1140 that implies that if states are given the express authority to impose civil and criminal penalties against federal facility violators the states would use that authority in an arbitrary or capricious fashion belies reality. Federal facilities tend to be large employers within their communities. The flow of federal dollars is almost always at least perceived by the community as important to its economic health. Elected officials routinely express fear that a federal facility might relocate if pressured too hard by state environmental regulatory authorities and that environmental laws must therefore be enforced only in a "balanced" way. Of course, these same constraints apply to private facilities, causing citizen activist groups in many states to complain that their departments of health and environmental quality for weak enforcement. There is no basis for the conjecture that these forces for restraint will be any less strong when the issue of enforcement at federal facilities arises. Yes, many of the federal facilities are big targets for RCRA enforcement, because the contamination they have caused is so egregious. But, that alone supplies no solid basis on which to spin scenarios of arbitrary and capricious action by elected or appointed state attorneys.

Another criticism of S. 1140 is that it will potentially divert resources from cleaning up the sites, or at least from cleaning up the worst sites first. As the committee members know, RCRA, unlike CERCLA, does not establish a prioritization for the thousands of hazardous waste facilities around the country. And, it is true that S. 1140 as written does not change that aspect of the law. It is also true that there is, at present no prioritization for clean up purposes of federal facilities, either on an agency by agency basis or generally. I sit on an External Review Group that has been briefed on several occasions about the DOE ranking system presently under development. From the information given that Group, it appears that DOE's system is unlikely to be compatible with the Department of Defense' ranking system which is itself dissimilar from EPA's. Thus, it is disingenuous at best to suggest that the federal government as a whole has or will have any time soon a prioritization system to apply to the RCRA-regulated facilities under its control, even if a prioritization were deemed appropriate for use at federal facilities despite the Congressional rejection of use of such a system for RCRA enforcement elsewhere.

Given that there is no prioritization of federal facilities extant, there is no reason to exempt federal facilities from compliance with RCRA's correction action provisions on the basis that such enforcement might reallocate clean up priorities. Here, too, a state with limited enforcement resources, i.e., virtually any state, is unlikely to devote the resources necessary to seek penalties at a federal facility, with its defending army of Department of Justice attorneys, if such facility is not at the top of the state's list of noncompliant polluters that pose a risk to public health, safety and the environment. Similarly, there is little likelihood of a citizen group initiating costly and time-consuming actions absent a substantial polluter who is blatantly violating the law. The Committee should simply resist attempts to amend S. 1140 to address a problem that does not exist.

In conclusion, on behalf of EDF, I urge the Committee and the Senate to pass S. 1140 in its present elegant and simple form so that RCRA enforcement at federal facilities can get back the track that Congress initially envisioned in section 6001 of equitable application. Only then will there be the appropriate incentives for federal agencies to act like other law-abiding citizens and stop the flood of contamination flowing from government owned operations. Thank you.

TESTIMONY OF
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

before the
SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

May 2, 1990

on
FEDERAL FACILITY COMPLIANCE ACT OF 1989
(S. 1140)

The Pennsylvania Department of Environmental Resources submits this written testimony for inclusion in the record of the May 2, 1990, hearing on Senate Bill 1140.

SENATE BILL 1140 - AMENDMENT TO SECTION 6001:

Pennsylvania supports this legislation to amend Section 6001 of the Solid Waste Disposal Act which waives federal facilities' sovereign immunity. The purpose of S. 1140 is to further clarify that federal facilities are subject to compliance with the same state and federal environmental laws and enforcement as private facilities.

With the enactment of the Solid Waste Disposal Act, and other statutes such as the Resource Conservation and Recovery Act, the Comprehensive Emergency Response, Compensation, and Liability Act, and the Clean Water Act, Congress clearly intended that federal facilities comply with all state environmental laws and local requirements. It was never intended that Section 6001 be interpreted to absolve federal facilities of their duty to act responsibly and respect state environmental laws.

For state regulatory agencies, the ability to take swift enforcement actions remains their greatest deterrence against environmental violations. However, federal agencies continue to deny the rights of states to enforce their environmental laws. These agencies either claim that states have no jurisdiction over them, or make it a routine practice to fight in court over the application of the sovereign immunity waiver.

With the support of the Department of Justice, federal agencies incorrectly interpret that the application of state environmental laws and law enforcement only applies to a very narrowly defined group of "requirements," which does not include the imposition of civil penalties pursuant to state environmental laws. S. 1140, Section 3(a)(3), clarifies that administrative orders and civil and administrative penalties and fines are included within the definition of "requirements."

However, S. 1140 still leaves room for federal agencies, through the Department of Justice, to interpret that administrative orders are enforceable against federal facilities only to the extent that they contain requirements within the narrow definition urged by the Department of Justice. Therefore, Pennsylvania suggests that rather than allow for further misinterpretation, S. 1140 should amend Section 6001 to eliminate the term "requirements" and otherwise clarify that federal facilities are subject to all state environmental laws. To this end, Pennsylvania suggest the following amendments:

1. Add a new subsection 3(a)(3) and renumber the current 3(a)(3) as 3(a)(4):

   By deleting from the first sentence, "requirements, both substantive and procedural" and replace it with "authority, including but not limited to any substantive or procedural requirement whatsoever"

2. Under the current subsection 3(a)(3), which is renumbered as subsection 3(a)(4), amend the current lines 13-14 to read, "The federal, state, interstate, and local authority referred to in this..."

3. In the same subsection, amend the current lines 15-17 to read, "subsection includes, but is not limited to, all state authority including state laws, regulations, decisional law, administrative orders and all civil and administrative penalties."

4. Renumber current subsection 3(a)(4) as new subsection 3(a)(5) and amend the current lines 19-20 to read, "For purposes of enforcing any such authority (including, but not limited...)"

PENNSYLVANIA PERSPECTIVE:

In 1989, Arthur Davis, Secretary of the Department of Environmental Resources, testified before a House subcommittee on similar legislation (H.R. 1056). At that hearing, Davis described Pennsylvania's experience with requiring certain federal facilities to cleanup contamination as a bewildering mix of reasonable progress, cooperation, frustrating delays and litigation.

Clearly, despite what seemed to be explicit waivers of sovereign immunity in most environmental laws, these federal facilities never admitted that they were subject to the enforcement of our laws. Though they concede that they need a permit, they do not concede that the same permitting agency has the ability to enforce the conditions of that permit.

The most prominent federal agencies that Pennsylvania has been dealing with are the Small Business Administration, the Army (Letterkenny Army Depot) and the Navy (Navy Ship Parts Control Center).

Small Business Administration: In this case, the Small Business Administration purchased property without performing a site inspection. Unfortunately, several hundred barrels of industrial and hazardous waste had been left on the site, some which were leaking onto the ground. The DER advised the SBA to sample the drums, determine the level of contamination and properly dispose of the waste. While the SBA finally began addressing some of the problems, the SBA made it abundantly clear that, in its opinion, the state has no legal authority to set requirements for sampling and cleanup. The SBA's cleanup decision was driven by its desire to sell the property.

Letterkenny Army Depot: This facility was listed in an August 1987 EPA consultant report as having the most potential for environmental problems of any federal facility in all of Region III. And after two years of inaction on the part of the Letterkenny Army Depot to close, assess and abate two leaking RCRA lagoons, the DER issued an administrative order. Two months later, the Army voluntarily signed the agreement under Section 120 of CERCLA with EPA, representing the first time in EPA Region III such an agreement was signed with a federal site. While Letterkenny voluntarily signed the agreement, the lagoons would have been closed much quicker had S. 1140 been law.

Navy Ship Parts Control Center: In August 1988, DER tested a drainageway owned by the Navy Ship Parts Control Center and found polychlorinated biphenyls (PCBs) in concentrations of as high as 260 ppm. Later that month, DER issued an order requiring the Navy to clean up existing contamination and halt further discharge in a reasonably timely manner. DER cited this authority under the state Solid Waste Management Act and Clean Streams Act. DER also informed the Navy of its obligation to comply under RCRA and the federal Clean Water Act.

The Navy, with the assistance of the Department of Justice, appealed the order to the Commonwealth Court, claiming that the state has no authority to require compliance under state laws because sovereign immunity has not been waived. After a year and a half of receiving the order, the Navy has yet to begin cleaning existing contamination. Not to mention that PCBs are still being discharged from the Navy's storm sewer, endangering groundwater. Without the means to force clean up, the Navy relegated Pennsylvania to the role of a simple advisor whose non-binding opinion they can accept or reject at will.

However, on March 15, 1990, Judge Craig ruled in favor of DER by finding that the state did have the authority to treat the Navy as it would any other polluter.

CONCLUSION:

There are several lessons we have drawn from our experiences. The most specific is that RCRA enforcement at federal facilities is essential and must be as vigorous as that under CERCLA. There are two good reasons for this.

First, and most basic, a strong RCRA program will prevent the creation of new sites of contamination. Pennsylvania is home to 22 Department of

Defense facilities and three Department of Energy facilities. Seven of these are currently regulated as RCRA treatment, storage or disposal facilities, many of them are generators under the act and some are certainly candidates for RCRA corrective action provisions.

Secondly, the slow, deliberate CERCLA cleanup process contains a mandated role for states, but it does not necessarily occur at the earliest stages where states can have the most influence over the remedial action. Enforcement under solid waste law, on the other hand, can spur action much faster and gives states a role of authority rather than technical advisor.

An integral part of the RCRA enforcement arsenal is the threat of civil penalties, which this legislation would give us explicit authority to impose. Penalties work. The incentive is not just a simple calculation by the violator of whether the penalty is greater than the costs of compliance.

Another argument raised by Federal agencies as grounds for opposing legislation, such as S. 1140, is that states could levy enormous fines, diverting cleanup funds. However, some states deposit revenues from fines for violation of environmental laws into an account used for cleanup. Pennsylvania deposits its revenues from violations of the Solid Waste Management Act and Clean Streams Act into two funds, which are used for response activities under those laws.

Clarifying the issue of sovereign immunity is essential to full compliance by federal installations. S. 1140, with the elimination of the "requirements" provision, would help to arm the states and the U.S. Environmental Protection Agency with the ability to enforce the laws of this land equally against all facilities. Pennsylvania urges Congress to approve this legislation.

CITY OF Riverside CALIFORNIA 92522 • 714/782-5551

TERRY FRIZZEL
Mayor

May 7, 1990

Ref.: NAFB-90-01

The Honorable Quentin N. Burdick
SH-511 Hart, Senate Office Building
Washington, D.C. 20510-3401

Dear Senator Burdick:

This letter is being written to communicate the City of Riverside's support for S. 1140 which was recently introduced into the Senate by Congressman Mitchell and to urge your support for the bill. The federal facilities compliance bill is currently being reviewed by the Senate Committee on the Environment and Public Works.

We believe that passage of the legislation is needed to insure that various remedies are available to the City of Riverside and other municipalities affected by pollution violations at federal facilities.

Such violations may be resolved by the affected parties through discussions with the officials involved with facility compliance activities. However, due to the potential impact of pollution violations, we believe that municipalities should have the opportunity to pursue other alternatives, if necessary, to insure that the violations are resolved.

The City of Riverside is in the process of addressing the groundwater contamination problem at Norton Air Force Base. We hope that our discussions with Norton officials will lead to effective mitigation of the problem and prevent the spread of contamination to municipal wells adjacent to the base. However, should our discussion not achieve the necessary result, we believe that other remedies should be available to the City in resolving this critical problem.

SISTER CITIES SENDAI, JAPAN CUAUTLA, MEXICO ENSENADA, MEXICO
SAN BERNARDINO, CALIFORNIA

Senator Burdick
Page 2
May 7, 1990
Subject: Riverside's support for S. 1140

Where other actions fail to resolve pollution violations, we believe that federal facilities in non-compliance should be subject to the same sanctions that apply to private companies and state and local governments. S. 1140 would eliminate the double standard that currently exists by requiring that such facilities comply on the same basis as other public and private entities.

The City of Riverside's support for federal facilities compliance legislation was approved by the Board of Public Utilities on June 2, 1989, and by the City Council on June 13, 1989. The City resolution supporting the House version of the bill (H.R. 1056) is attached for your review.

We urge your active support for S. 1140 to assist the City of Riverside in protecting the local groundwater supply.

Sincerely,

Terry Frizzel

Terry Frizzel
Mayor

BDC:RLS:ljr

RESOLUTION NO. 17158

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF RIVERSIDE, CALIFORNIA, EXPRESSING THE POSITION OF THE BOARD OF PUBLIC UTILITIES AND THE CITY OF RIVERSIDE AND URGING CONGRESS TO SUPPORT THE PASSAGE OF H.R. 1056.

WHEREAS the City of Riverside, through the Board of Public Utilities, provides water service within the City of Riverside; and

WHEREAS the preservation of the City's groundwater supply is of critical importance to the water consumers and ratepayers within the City; and

WHEREAS the City's groundwater supply is in imminent danger of being polluted by contamination spreading to our municipal water wells from Norton Air Force Base; and

WHEREAS the spread of the contamination has not been adequately addressed or resolved by Norton Air Force officials to prevent contamination of our wells; and

WHEREAS the City of Riverside, through the Board of Public Utilities, believes that affirmative action to prevent the imminent spread of contamination is needed by the City to protect the groundwater supply in areas near the Base; and

WHEREAS there is now pending before Congress proposed legislation (HR 1056) that will help the City alleviate this contamination problem by providing the means to force the federal government to clean-up federal facilities such as Norton Air Force Base;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Riverside that the City of Riverside and the Board of Public Utilities urges the Congress to support passage of HR 1056 during the current legislative session to help the City of Riverside and other water suppliers protect the local groundwater supply.

ADOPTED by the City Council and signed by the Mayor and attested by the City Clerk this 13th day of June, 1989.

Mayor of the City of Riverside

Attest:

Alice A. Hare
City Clerk of the City of Riverside

I, Alice A. Hare, City Clerk of the City of Riverside, California, hereby certify that the foregoing resolution was duly and regularly introduced and adopted at a meeting of the City Council of said City at its meeting held on the 13th day of June, 1989, by the following vote, to wit:

Ayes: Councilmembers Loveridge, Clarke, Bowers, Osborne, Digati and Frizzel.

Noes: None.

Absent: Councilwoman Mansfield.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of the City of Riverside, California, this 13th day of June, 1989.

Alice A. Hare
City Clerk of the City of Riverside

JW/1167R/h
6-12-89

National Conference of State Legislatures

444 North Capitol Street, N.W.
Suite 500
Washington, D.C. 20001
202/624-5400
FAX/202-737-1069

Lee A. Daniels
House Minority Leader
Illinois
President, NCSL

Patrick J. O'Donnell
Clerk of the Legislature
Nebraska
Staff Chair, NCSL

William T. Pound
Executive Director

RECEIVED BY
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June 11, 1990

The Honorable Quentin Burdick
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing on behalf of the National Conference of State Legislatures to support passage of S.1140 as introduced by Majority Leader George Mitchell. We would urge the Environment and Public Works Committee to pass the bill without amendment at its mark-up scheduled for Tuesday, June 12, 1990.

As a matter of equity, the federal government should face no less of a sanction than state and local governments and private parties in the enforcement of hazardous waste violations. Such reciprocal exposure is exhibited in the Clean Air Act, the Safe Drinking Water Act and the Medical Waste Tracking Act of 1988, each of which waives federal sovereign immunity in order to permit states to assess civil penalties against federal facilities.

We are also writing to strongly object to an amendment that may be offered at mark-up, which would earmark state fines and penalties for environmental protection or enforcement. We object because federal earmarking of state revenues contravenes federalism principles. We have discovered no reason for states to begin to have their fiscal processes controlled from the federal government. Earmarking may be a useful idea, and many states already earmark their fines and penalties to environmental purposes; however, earmarking can have unintended consequences by reducing appropriations for the earmarked activity.

Federal earmarking also undermines principles of justice. The precedent of the law-breaker (in this instance the federal government) seeking to control the use of fines and penalties paid to the law enforcer (in this case state governments) is illogical and inappropriate. By controlling the use of fines and penalties, the federal government takes the sting out of paying fines and penalties, thus neutralizing the punitive nature of the sanction. Earmarking is thus consistent with other attempts to weaken the bill.

For these reasons we urge you to support S.1140 without amendment.

Sincerely,

Mike Box

Mike Box
Chair, NCSL Law and Justice Committee
Vice Chair, Judiciary Committee
Alabama, House of Representatives

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Statement of

THE NATIONAL CONFERENCE OF STATE LEGISLATURES

submitted to

THE UNITED STATES SENATE

ENVIRONMENT AND PUBLIC WORKS COMMITTEE

Regarding S.1140, The Federal Facilities Compliance Act

May 2, 1990

Mr. Chairman and members of the Committee, this statement is submitted by the National Conference of State Legislatures to urge adoption of S.1140, the Federal Facilities Compliance Act. Our strong support for the bill rest upon two prime concerns. First, we must place the highest priority on ending the hazards posed to our citizens by toxic waste. The Act provides a necessary mechanism in the range of tools enforcers need to induce obedience to the law. Second, as a matter of fairness, every violator must be subject to the sanctions necessary to insure compliance. The Act clarifies the congressional intent that when the federal government fails to comply with lawful mandates, it will be treated no differently than states, localities and private businesses with respect to penalties.

Congress intended to waive federal sovereign immunity when the Resource Conservation and Recovery Act became law, but recalcitrant federal agencies are fighting an expensive battle to challenge the waiver of sovereign immunity. In four states, the federal agencies have convinced the federal courts that by subjecting the federal government to "all" substantive and procedural requirements, Congress somehow did not intend to subject the federal government to fines and penalties. Other federal courts have upheld the right of the states to impose fines and penalties, but the dispute has encouraged the diversion of federal resources from cleanup to litigation.

On the necessity for action, the record is replete with examples of federal agencies seeking to avoid compliance and thereby endangering the public through careless or worse conduct. For example, at the Department of Energy's Production Center in Fernald, Ohio, tons of radioactive particles contaminated the air and groundwater. The Ohio Attorney General stated that experience has shown that self-regulation by the Department of Energy has not protected the public and that the threat of civil penalties is critical to compliance.

On the issue of fairness, it makes no sense for the federal government, which has maintained facilities that in the words of then-Vice President Bush, are "some of the worst offenders," to exempt itself from the operation of the law. Efforts to clean the

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environment and prevent future hazards require consistent, even-handed attack on the violators. On the one hand, state and local governments are subject to fines and penalties for violations of the law, while the federal government shields itself behind its power to carve out an exemption. When the federal government creates such an exception for itself, it creates disrespect for the law and cynicism about the value of the government as a protector of the public.

While defenders of the violating agencies contend that the assessment of fines and penalties would be a raid on the national treasury, we contend that tougher enforcement, with the motivator of fines and penalties will reduce costs to the federal government in the future. Compliance with regulations will prevent unnecessary expenditures of millions of dollars of clean-up costs The savings and loan crisis is a warning that failure to enforce effectively can create enormous costs in the future.

The question of fairness also comes into play when we remember that states ask for no greater power against the federal treasury than the federal government has against state treasuries. In fact, the United States Environmental Protection Agency (EPA) seeks fines and penalties in nearly 90 percent of its civil suits against states and municipalities.

It is beyond irony that federal agencies, in concert with the Department of Justice, propose that they are above the federal law. The EPA is curtailed in its efforts to enforce compliance at federal facilities because of a "unitary executive" theory that the Justice Department espouses to protect one agency from exercising judicial enforcement against another. Therefore, the duty to protect our people from harm falls to the states. Unfortunately, denying the waiver of federal sovereign immunity emasculates the state's power to enforce. In many instances, that leaves the offender in the position of self-regulation, which has proven to be dangerously ineffective. States serve a crucial role in bridging the enforcement gap. It is the carefully reasoned foundation of our federalism that shared and balanced powers protect our citizens from the deficiencies and excesses of other levels of government. It is wrong to further stymie the efforts of the states by denying them their rightful tools to motivate compliance.

In our federal system, states retain the inherent power and the duty to protect the health and safety of their citizens through the police powers. This duty was acknowledged when Congress passed the Solid Waste Disposal Act, as amended by RCRA, which delegated to states the primacy for environmental enforcement. With these powers, states are to fulfill national policy objectives with our own resources appropriated for attorneys general for enforcement, and at the same time, states are denied the power act effectively.

Some interest has been expressed in curtailing state powers in other ways as well. Language was adopted in a floor amendment in the House, which would earmark state fines and penalties for environmental purposes. NCSL would urge you to oppose this approach if it is offered. We question whether Congress would even have the authority under the Constitution to control state revenues so intrusively. We have discovered no precedent for such overreaching. A similar proposal to earmark state revenues under the Clean Air Act was rejected on federalism grounds.

We support the principle of providing sufficient financial support for enforcement of environmental clean-up. However, we strongly object to the method proposed.

Earmarking has been debated at the state level; some states have adopted it for environmental programs. However, its value is not such that it should be mandated nationwide. By allowing national or state legislatures to claim that they have provided funds through earmarking, efforts to achieve adequate funds for clean-up through the appropriations process can lose their force.

Attempts by the federal government to earmark state revenues is not justifiable in other terms. It represents an indefensible attempt by the law breaker, (in this instance, the federal agency) to control fines and penalties that it must pay to the law enforcer, (in this case, the state). Further, arguments that the federal legislature must earmark state collected fines and penalties to prevent their use for the general fund show both a lack of appreciation for the principles of shared power between the states and the national government and a failure to comprehend the fiscal processes within the states themselves. Attorneys general are not responsible for raising general fund revenue; legislatures are. Legislatures, on the other hand, do not execute the environmental laws. Proposing such a far-fetched conspiracy against the federal treasury also overlooks the fact that the federal agency has the power to challenge the allegedly unfair assessment before a *federal* judge in *federal* court. The expressions of fear about state action against the federal government also suggest a convenient ability to forget that the federal government has power to collect fines and penalties against states, and states do not have the power to earmark such federal revenues.

The earmarking issue distracts attention from the central concern of safeguarding the powers of those who protect our people from grave dangers to their health and safety. The Clean Air Act, the Safe Drinking Water Act and the Medical Waste Tracking Act of 1988 have all operated effectively without an earmarking provision. The nation's legislatures call on Congress to pass S.1140 as introduced, in order to eliminate the unfair double standard that undermines respect for law enforcement. Such an action will expedite the important business of maintaining a healthy environment for our citizens.

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
1033 NORTH FAIRFAX STREET, SUITE 200, ALEXANDRIA, VIRGINIA 22314
(703) 549-9222

OFFICE OF THE EXECUTIVE DIRECTOR

May 1, 1990

Senator Quentin N. Burdick
Chair Environment and Public Works Committee
458 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Burdick:

The National District Attorneys Association supports Senate Bill 1140, legislation which will help ensure that federal facilities comply with environmental laws. S.1140, which is pending in your Environment Committee, would clarify the waiver of federal sovereign immunity under the Resource Conservation and Recovery Act. We would appreciate your including this letter in the hearing record.

NDAA joins with the National Association of Attorneys General, the National Governors' Association, the Western Governors' Association and the National Conference of State Legislatures in urging passage of S.1140. Attached is a copy of the resolution adopted by NDAA.

We call your attention to the importance of criminal sanctions for federal employees who violate the law. As you know, the law presently allows criminal prosecution of federal and private employees. As a matter of fairness, federal employees should also assume responsibility for their acts. We do not see any need to change existing law in this regard.

Some of the worst hazardous waste sites and some of the most difficult hazardous waste management problems involve federal facilities. Many states have been frustrated in their attempt to hold federal agencies accountable under the environmental laws. Federal agencies should comply with the same standards that apply to private industry, state agencies and municipalities.

S.1140 will help ensure that federal facilities comply with the law and are properly managed in the future. The option of civil penalties as contemplated under S.1140 is an essential enforcement tool for states to use in their environmental programs designed to protect human health and the environment. Civil penalties help get the federal government's attention, induce compliance, and deter future misconduct by federal and other regulated agencies.

If you or your staff have any questions about this matter, please feel free to call Dwight Price, the Association's legislative director, who can be reached at 549-9222.

Thank you for your consideration of NDAA's policy position on this matter.

Sincerely,

JACK E. YELVERTON
Executive Director

JEY:elg
Enclosure

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Summer Meeting
July 16, 1989
Portland, Maine

RESOLUTION

URGING THE CONGRESS OF THE UNITED STATES TO ADOPT LEGISLATION CLARIFYING THE WAIVER OF FEDERAL SOVEREIGN IMMUNITY TO SUBJECT FEDERAL FACILITIES AND AGENTS, EMPLOYEES OR OFFICERS OF THE UNITED STATES TO THE SAME ACCOUNTABILITY THAT APPLIES TO STATES, LOCAL GOVERNMENTS AND PRIVATE INDUSTRY, ESPECIALLY CRIMINAL SANCTIONS, INCLUDING FINE OR IMPRISONMENT.

WHEREAS, a significant number of the most dangerous hazardous waste disposal sites in the United States that pose a significant threat to public health and the environment are located at federal facilities; and

WHEREAS, federal facilities are among the worst violators of federal and state solid and hazardous waste laws; and

WHEREAS, Executive Order 12088 requires all federal agencies to comply with all applicable pollution control standards; and

WHEREAS, the states have experienced significant problems in bringing federal facilities into compliance with federal and state solid and hazardous waste laws because the federal facilities refuse to acknowledge state regulatory authority over their facilities; and

WHEREAS, disputes over state enforcement authority at federal facilities has caused costly, time-consuming and acrimonious litigation between the states and the federal agencies; and

WHEREAS, the U.S. Environmental Protection Agency's and the states' lack of clear enforcement authority has eroded the public confidence in the federal government's willingness and ability to address the serious solid and hazardous waste management problems at federal facilities; and

WHEREAS, federal agencies must be subject to the same sanctions as private industry, states , and local governments for violations of federal and state solid and hazardous waste laws to deter violations of and ensure compliance with these laws; and

WHEREAS, the Congress is considering HR 1056 and S 1140, which would clarify the federal sovereign immunity waiver under the Resource Conservation and Recovery Act.

NOW, THEREFORE, BE IT RESOLVED THAT
THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION:

1) supports HR 1056 and S1140, legislation which would a) provide states with comprehensive enforcement authority for hazardous waste programs; b) subject federal facilities to the same accountability, procedural, and substantive enforcement provisions that apply to state and local governments and private industry; c) enhance proper waste management practices at federal facilities in the future by ensuring that federal agencies comply with federal and state solid and hazardous was laws; and d) most importantly, subject any agent, employee, or officer of the United States to any criminal sanction (including, but not limited to, fine or imprisonment) under any state solid or hazardous waste law; and

2) authorizes the Executive Director and General Counsel to transmit this resolution to the President of the United State and to the Environmental Protection Agency Administrator, William Reilly, and to the appropriate members of his staff; to Secretary Cheney of the Department of Defense; to Admiral Watkins of the Department of Energy; to the members of Congress; and to other interested associations.

II

101st CONGRESS
1st Session

S. 1140

To provide that Federal facilities meet Federal and State environmental laws and requirements and to clarify that such facilities must comply with such environmental laws and requirements.

IN THE SENATE OF THE UNITED STATES

June 7 (legislative day, January 3), 1989

Mr. Mitchell (for himself, Mr. Lautenberg, and Mr. Baucus) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works.

A BILL

To provide that Federal facilities meet Federal and State environmental laws and requirements and to clarify that such facilities must comply with such environmental laws and requirements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Federal Facility Compliance Act of 1989".

FACILITY ENVIRONMENTAL ASSESSMENTS

Sec. 2. (a) Each department, agency, and instrumentality of the United States shall perform an assessment of the releases of hazardous substances (including hazardous constituents thereof) from each solid waste management unit at each hazardous substance treatment, storage, or disposal facility owned or operated by the department, agency, or instrumentality after November 19, 1980. Such assessments shall be completed within twelve months after the enactment of this section and shall indicate whether such facility and department, agency, or instrumentality is in compliance with applicable requirements of the Solid Waste Disposal Act, the Comprehensive Emergency Response, Compensation, and Liability Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Toxic Subtances Control Act. Such assessments shall be provided to the Environmental Protection Agency and to the State in which the facility is located.

(b) FACILITY INSPECTIONS.—The Administrator of the Environmental Protection Agency shall undertake a thorough inspection annually of each facility owned or operated by a department, agency, or instrumentality of the United States to enforce compliance with the Solid Waste Disposal Act, the Comprehensive Emergency Response, Compensation, and Liability Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Toxic Substances Control Act. Each annual inspection shall include an analysis of comprehensive groundwater monitoring. The records of such inspections shall be available to the public in the same manner as provided in section 3007(b) of the Solid Waste Disposal Act.

APPLICATION OF CERTAIN PROVISIONS TO FEDERAL FACILITIES

Sec. 3. (a) In General.—Section 6001 of the Solid Waste Disposal Act (42 U.S.C. 6961) is amended—

(1) by inserting "(a) In General.—" after "6001.";

(2) in the first sentence, by inserting "and management" before "in the same manner";

(3) by inserting after the first sentence the following: "The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines."; and

(4) by inserting after the second sentence the following: "For purposes of enforcing any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order, or civil or administrative penalty or fine) against any such department, agency, or instrumentality, the United States hereby expressly waives any immunity otherwise applicable to the United States. No agent, employee, or officer of the United States shall be person-

ally liable for any civil penalty under any Federal or State solid or hazardous waste law with respect to any act or omission within the scope of his official duties. An agent, employee, or officer of the United States shall be subject to any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or State solid or hazardous waste law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction.".

(b) ADMINISTRATIVE ENFORCEMENT ACTIONS.—Such section is further amended by adding at the end the following new subsection—

"(b) ADMINISTRATIVE ENFORCEMENT ACTIONS.—(1) The Administrator may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government pursuant to the enforcement authorities contained in this act. The Administrator shall initiate an adminitrative enforcement action against such a department, agency, or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person. Any voluntary resolution or settlement of such an action shall be set forth in a consent order.

"(2) No administrative order issued to such a department, agency, or instrumentality shall become final until such department, agency, or instrumentality has had the opportunity to confer with the Administrator.".

DEFINITION

SEC. 4. (a) PERSON.—Section 1004(15) is amended by adding the following before the period: "and shall include each department, agency, and instrumentality of the United States.".

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